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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

NOVEMBER TERM, 1912-13

BY

LAWRENCE H. LEE

Supreme Court Reporter

VOL. 183.

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CASES

IN THE

SUPREME COURT OF ALABAMA

NOVEMBER TERM 1912-13.

Tennison v. The State.

Murder.

(Decided June 11, 1913. 62 South. 780.)

1. *Homicide Threats; Evidence.*—Although of slight probative force, a statement made by a defendant to a deceased, made about a week prior to the killing, that deceased had better not appear against defendant in court, was in the nature of threats, and admissible as such.

2. *Evidence; Incriminating Another.*—Evidence for the purpose of incriminating another than defendant must relate to the res gestæ of the transaction, and must not be of conduct, declarations or admissions of the party on whom it is attempted to cast suspicion as the guilty agent.

3. *Witnesses; Impeachment; Inconsistent Statement.*—Where a witness testified to facts damaging to defendant, it was competent, after predicate laid, to show previous statements by her that she did not see how they got defendant into it, not for the purpose of showing that her husband, upon whom defendant tried to cast suspicion was the guilty party, but for the purpose of attacking her credibility as a witness.

4. *Charge of Court; Abstract and Misleading.*—Where the testimony of the witness for the state did not tend to show any conspiracy between him and defendant, a charge asserting that a conspiracy to do an unlawful act without any express agreement or implied agreement may exist, or that there may exist a community of purpose, to do such acts, and if the jury find that there is no testimony of such conspiracy between defendant and the witness, to take the life of deceased, then unless the witness' statement connecting defendant with the commission of the offense is corroborated by evidence other than his own, they cannot convict defendant on the theory of a conspiracy between such witness and defendant, or of a community of purpose to take the life of deceased, is abstract and misleading, if not otherwise objectionable.

5. *Same; Invading Province of Jury.*—A charge asserting that a defendant cannot be convicted if the jury disbelieves the evidence of a certain witness, is invasive of the province of the jury, where there

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was evidence other than such testimony upon which they could have found a verdict of guilt.

6. *Same; Abstract*.—A charge asserting that if the only evidence tending to corroborate the testimony of a witness that tends to connect defendant with the crime is that of the wife of the witness, and if the jury do not believe her testimony, they must find defendant not guilty, is abstract, where there is other testimony tending to corroborate such witness.

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

Fletcher Tennison was convicted of murder, and he appeals. Reversed and remanded.

Ora Slaton in testifying stated, in response to the question by the solicitor if she had heard a conversation between her husband and defendant in reference to his going out of the state and leaving and not appearing here before the grand jury about Mr. Tennison, said: "I heard Arthur ask Fletcher just about a week before the killing to buy his crop; that he didn't want to appear against him in the court, and Fletcher said, 'What is your hurry about it?' and Arthur replied, 'I don't want to appear against you in court,' and Fletcher said: 'You had better not.'"

The following charges were refused to defendant:

"(20) I charge you that there may be a conspiracy to do an unlawful act without an agreement, express or implied, or that there may exist a community of purpose between two or more parties to do such act; and, if you find from the evidence in this case that there is no testimony of such conspiracy between this defendant and Oscar Pitts, to take the life of Arthur Slaton, then I charge you that, unless said Pitts' statement connecting this defendant with the commission of the offense charged in the indictment is satisfactorily corroborated by evidence other than Pitts', then you cannot convict this defendant on the theory that he entered into a conspiracy with Pitts, or that there existed between

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him and Pitts a community of purpose to take the life of Arthur Slaton.

“(21) If the jury do not believe the evidence of the witness Oscar Pitts, the defendant cannot be convicted.”

“(23) If you believe from the evidence that the only evidence tending to corroborate the testimony of Oscar Pitts that tends to connect the defendant with the commission of the offense is the testimony of Lena Pitts, and if the jury do not believe the testimony of Lena Pitts to be true, they must find the defendant not guilty.”

W. R. WALKER, for appellant. No matter how strong the circumstances, if they can be reconciled with the theory that one other than the accused committed the crime, he should be acquitted.—*Pickens v. State*, 115 Ala. 42; *Ex parte Acree*, 63 Ala. 234; *Pittman's Case*, 148 Ala. 612; *Ott's Case*, 160 Ala. 29. When the evidence is circumstantial it is competent for the defendant to introduce evidence tending to show that another did the act charged, but the evidence must relate to and be derived from the facts and circumstances constituting the offense.—*Bank's Case*, 72 Ala. 522; *Bowen's Case*, 140 Ala. 65; *Walker's Case*, 139 Ala. 56; *Brown's Case*, 120 Ala. 342; *Price's Case*, 100 Ala. 144; 6 Ency. Ev. 749 et seq.; *Alexander v. U. S.*, 138 U. S. 353, 34 L. Ed. 954; *Henry v. State*, 30, S. W. Rep. 802; *Franklin v. Com.*, 48 S. W. Rep. 986; *Martin v. State*, 70 S. W. Rep. 973; *Wilkins v. State*, 34 S. W. Rep. 627; *Com. v. Werntz*, 29 Atl. Rep. 272; *Woolfolk v. State*, 8 S. E. Rep. 724. A conviction cannot be had on uncorroborated testimony of accomplice.—Code of 1907, sec. 7897; *Malachi's Case*, 89 Ala. 134; *Lumpkin's Case*, 68 Ala. 56; *Lindsay's Case*, 170 Ala. 80; *McDaniel's Case*, 162 Ala. 25; 98 A. S. R., 158 note. Evidence collateral

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to issue, tending to confuse or mislead the jury should not be admitted.—*Thrash v. Bennett*, 57 Ala. 157; *Leffler v. Lehman*, 57 Ala. 433; *Brewer v. Watson*, 65 Ala. 88; *Wharton v. Cunningham*, 46 Ala. 590; *Trammell v. Hudmon*, 56 Ala. 235. Circumstances or facts which do not directly tend to prove or disprove the matter in issue are not admissible.—*McCormack's Case*, 102 Ala. 161; *State v. Wisdom*, 8 Port. 511. The test of the relevancy of evidence in a criminal case is whether it conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being that which, if sustained, would logically influence the issue.—*Whittaker's Case*, 106 Ala. 30; *Curtis' Case*, 118 Ala. 125. Whatever tends to shed light on the main inquiry, and does not withdraw the attention of the jury from the main inquiry by obtruding upon them matters which are foreign, or of questionable pertinency, is, as a general rule, admissible in evidence. On the other hand, undue multiplication of issues is to be guarded against as tending to divert the minds of the jury from the main issue.—*Mattison's Case*, 55 Ala. 224; *Gassenheimer's Case*, 52 Ala. 313; *Berney's Case*, 69 Ala. 233; *Fincher's Case*, 58 Ala. 215. The admission of irrelevant evidence is an error for which the judgment of conviction will be reversed, unless the record affirmatively shows that the defendant could not have been injured by it.—*Thompson's Case*, 20 Ala. 54; *Thomas v. de Graffenried*, 27 Ala. 651; *Magee v. Clark*, 40 Ala. 259; *Abraham v. Nunn*, 42 Ala. 51; *L. & N. R. R. Co. v. Price*, 159 Ala. 213; *Donaldson v. Wilkerson*, 170 Ala. 507, 512; *Empire Life Ins. Co. v. Gee*, 171 Ala. 435, 443; *B'ham Ry. L. & P. Co. v. Beck*, 1 Ala. App. 291, 295; *Bolton v. Cuthbert*, 132 Ala. 403; Dec. Dig. Appeal & Error, S. 1031; *March v. Trick*, 1 Ala. App. 649; *Western Ry. of Ala. v. Irvin*, 2 Ala. App. 577; *Abernathy's Case*, 129 Ala. 85; *Max-*

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well's Case, 89 Ala. 150; Code of Ala. 1907, sec. 6264: *Cauley's Case*, 92 Ala. 71.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The question asked the witness Ora Slaton relative to the conversation between the deceased and the defendant, though of slight probative force was in the nature of a threat and properly admitted. Other statements of the same nature were such as to show motive or malice.—*Hudson v. State*, 61 Ala. 333; *Evans v. State*, 62 Ala. 6; *Gray v. State*, 13 Ala. 66, 73; *Woods v. State*, 76 Ala. 35, 42; *Long v. State*, 86 Ala. 36, 43; *Wims v. State*, 90 Ala. 6, 23; *Spraggins v. State*, 139 Ala. 93, 103; *Fowler v. State*, 155 Ala. 21, 27. It was not permissible to show the details of the difficulty between the deceased and Oscar Pitts.—*McAnally v. State*, 74 Ala. 9; *Martin v. State*, 77 Ala. 1; *Gordon v. State*, 140 Ala. 29; *Sanford v. State*, 2 Ala. App. 81, 89. Evidence incriminating another must relate to the *res gestæ*, and not to the conduct, declarations, or alleged confessions of the party on whom it is attempted to cast suspicion. Such evidence must relate to and be derived from the facts of the killing.—*Levison v. State*, 52 Ala. 520, 527; *Banks v. State*, 72 Ala. 522, 526; *Marks v. State*, 87 Ala. 89; *Prince v. State*, 100 Ala. 144, 148; *Brown v. State*, 120 Ala. 342, 348; *Walker v. State*, 139 Ala. 56, 66; *Walker v. State*, 153 Ala. 31, 35; *McDonald v. State*, 165 Ala. 85, 89; *McGehee v. State*, 171 Ala. 19, 23. The question asked the witness Pitts, relative to his wife did not elicit legal impeaching testimony.—Code section 4009.—*Deal v. State*, 136 Ala. 52; *Gordon v. State*, 140 Ala. 29. The presence of blood around the scene of the tragedy and on the fence rails was part of the *res gestæ*, and admissible in evidence.—*Cleve Campbell v. State*, 182

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Ala. 18. What the defendant said relative to being in favor of obtaining bloodhounds was self-serving and inadmissible.—*Spivey v. State*, 26 Ala. 90, 103; *Taylor v. State*, 42 Ala. 529, 539; *Stewart v. State*, 63 Ala. 199; *Bonham v. State*, 65 Ala. 456, 458; *Billingslea v. State*, 68 Ala. 486, 492; *Williams v. State*, 105 Ala. 96; *Ferguson v. State*, 134 Ala. 63, 70. The report heard by the witness Dupree was proper to show the value of witness' evidence of defendant's good character. It was permissible for the state to elicit on cross-examination the details of the defendant's character.—*Steele v. State*, 83 Ala. 20; *Thompson v. State*, 100 Ala. 70; *Smith v. State*, 103 Ala. 57; *Andrews v. State*, 159 Ala. 14, and cases cited on page 25 of the opinion. Charge 23 permitted the jury to discard the testimony of a witness without finding it willfully false.—*Prater v. State*, 107 Ala. 26; *Gillespie v. Hester*, 160 Ala. 444; *Keef v. State*, 60 South. Rep. 962.

ANDERSON, J.—The proof by Ora Slaton, in a conversation between the defendant and deceased, that defendant told deceased he had better not testify against him, though of slight probative force, was in the nature of a threat, and was properly admitted.

Evidence incriminating another must relate to the *res gestæ*, and not to conduct, declarations, or alleged confessions of the party on whom it is attempted to cast suspicion.—*McGehee v. State*, 171 Ala. 19, 55 South. 159; *Levison v. State*, 54 Ala. 520.

The previous declarations of the witness Lena Pitts were not admissible for the purpose of showing that Oscar Pitts, and not the defendant, was the guilty party, but they were admissible as going to the credibility of the witness. She had testified as to facts damaging to the defendant, and which tended to connect

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him with the homicide, and a previous statement by her that she did not see how they got Fletcher, this defendant, into it was inconsistent with her testimony against him. If she made such a remark, it was a circumstance for the jury to consider in weighing her subsequent testimony, for it was inconsistent with her evidence and of her knowledge of the facts narrated against the defendant. The trial court erred in not permitting the defendant to cross-examine this witness by asking her as to statements and declarations made by her which were inconsistent with her testimony; the time and place of making same having been sufficiently laid.

Charge 20, refused the defendant, if not otherwise bad, was abstract and misleading. The testimony of Pitts did not show any conspiracy between him and the defendant, but tended to show that Pitts was not a party to the killing, and if there was a conspiracy, it was not established by the evidence of Pitts.

Charge 21, requested by the defendant, if not otherwise bad, invaded the province of the jury, as there was other evidence from which the jury could find the defendant guilty, even if they did not believe the evidence of Oscar Pitts.

Charge 23, refused the defendant, if not otherwise bad, was abstract, as there was testimony other than that of Lena Pitts tending to corroborate Oscar Pitts.

The other rulings upon the evidence were free from error, and a detailed discussion of same can serve no good purpose.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

[McOllister v. The State.]

McOllister v. The State.*Murder.*

(Decided June 12, 1913. 62 South. 787.)

Bill of Exceptions; Presentation; Time.—A bill of exceptions must be presented to the trial judge within the time provided by section 3019, Code 1907, which must be shown by the endorsement of the judge thereon, and where not shown to have been presented within that time, such bill of exceptions must be stricken on motion as provided by section 3020, Code 1907.

APPEAL from Colbert Circuit Court.

Heard before Hon. C. P. ALMON.

Tom McOllister, alias, etc., was convicted of murder and he appeals. The case was submitted on motion to strike the bill of exceptions, and on the merits. The bill of exceptions stricken and the cause affirmed.

ALMON, ANDREWS & PEACH, for appellant. No brief reached the Reporter.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The motion to strike the bill of exceptions should be sustained. The judgment of the court was rendered on October 19, 1912, and the bill of exceptions presented to the trial judge on January 18, 1913, ninety-one days after the judgment.—Code, section 3019; *McLeod v. Flournoy*, 3 Ala. App. 547; *Yolande Coal & Coke Co. v. Norwood*, 4 Ala. Apls, 390; *Cassells' Mill v. Strater Bros. Grain Co.*, 166 Ala. 274.

MAYFIELD, J.—The bill of exceptions in this case must be stricken on motion of the Attorney General.

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The time within which bills of exceptions must be presented to the trial court and signed by him is fixed by statute.—Code, § 3019. They are required to be presented within 90 days from the day on which judgment is entered. The true date of presenting is required to be evidenced by the trial judge and by his signing his name to such indorsement.

The judgment in this case was entered on October 19, 1912, and the indorsement of the trial judge shows that it was presented to him on January 18, 1913. It was therefore not presented within the time prescribed by the statute and must be stricken on motion of the Attorney General, as is authorized by section 3020 of the Code.—*Cassell's Mill v. Strater Bros.*, 166 Ala. 274, 51 South. 969, and cases cited; *Smith v. State*, 166 Ala. 24, 52 South. 396; *Edinburgh Co. v. Canterbury*, 169 Ala. 444, 53 South. 823; *Smith v. Smith*, 173 Ala. 547, 55 South. 1009.

The record in this case has been carefully examined and searched for error as required by section 6264 et seq. of the Code, but no error has been found. It therefore results that the judgment of the lower court must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

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Smith v. The State.*Murder.*

Decided May 8, 1913. Rehearing denied June 19, 1913.
62 South. 864.)

1. *Appeal and Error; Harmless Error; Evidence.*—Where there was ample other proof that deceased knew that defendant had the gun, it was not error to reversal to exclude the evidence of a witness, present at the time, who had testified that he saw a gun on defendant's person, as to whether deceased could have seen the gun.

2. *Same.*—Where evidence is afterwards excluded with instructions to the jury to disregard such evidence, the error in admitting it is cured.

3. *Same.*—The practice of excluding evidence generally, as by a ruling "excluding everything except what defendant said" with reference to a certain matter is not to be commended.

4. *Same; Review; Presentation Below.*—Where the only objection to evidence was by a motion to exclude such evidence after it had gone to the jury, the objection was too late to authorize this court to review the court's action thereon.

5. *Same; Right to Allege.*—Where a defendant took the initiative in eliciting part of the details of a difficulty between defendant and another which resulted in the arrest of defendant by deceased shortly before the homicide, the defendant could not object to the admissions of such details in evidence, although they were not admissible for the state.

6. *Same; Presentation Below.*—Error in admitting evidence cannot be reviewed where the action of the court in admitting it was not excepted to.

7. *Same; Harmless Error; Evidence.*—Evidence that defendant was connected with the running of a blind tiger was immaterial and its admission cannot be said to be harmless to the defendant.

8. *Same.*—Where a statement by a deceased immediately after he was shot did not identify the assailant or the circumstances of the assault, its admission cannot be said to be harmful.

9. *Homicide; Evidence.*—Evidence as to the caliber of the revolver by which deceased was shot was not relevant or material on the question whether defendant or deceased fired the first shot.

10. *Same.*—The evidence examined and it is held to be a question for the jury whether deceased saw defendant's gun when they went out together.

11. *Same; Threats.*—As threats may be made by words which are meaningless unless explained, and the fact that a threat is coupled with a condition, merely affects its weight as evidence, and not its

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admissibility, the rule that the circumstances connected with threats made previous to the killing are not admissible, is subject to exceptions; hence, the state may show the meaning of a condition attached to a threat where its meaning does not appear on the face of the threat.

12. *Same; Dying Declarations.*—The exclamation by deceased "boys, he has killed me!" made while he was lying on the floor after being helped into the room immediately after he was shot, where he died within a few minutes, was admissible as the wound was mortal, and the circumstances showed that deceased realized his impending dissolution when he made the exclamation.

13. *Same; Res Gestæ.*—Where a son of deceased came into the room where the body of deceased lay, about ten minutes after deceased had died, and asked, while crying, "is my papa dead?" the reply of defendant, "Yes, old Pat is dead, Son," was not admissible as a part of the *res gestæ*.

14. *Same; Hostility.*—The evidence as stated above became admissible as tending to show hostility at the time of the statement, and hence, to authorize an inference of hostility at the time of the killing where it further appeared that defendant repeated the statement three times, each time raising his voice as he did so.

15. *Same.*—Evidence of subsequent hostility by defendant is admissible provided the time between its expression and the time of the killing is not too distant; it being for the trial judge to determine whether the intervening time is too long to permit an inference of hostility at the time of the killing.

16. *Same; Clothing.*—The clothing worn by deceased showing the location of the wound is admissible in evidence.

17. *Same.*—Where defendant appeared at the trial with one leg gone, having lost it previous to the homicide, it was competent to show that at the time of the homicide he was going about on two legs, one of which was wooden; it being for defendant to explain the circumstances if he thought the evidence admitted prejudicial to him.

18. *Evidence; Purpose.*—Where evidence is admissible for a proper purpose, it cannot be excluded on the ground that it was susceptible of being used to the prejudice of defendant; his remedy being to instruct the jury as to its legitimate purpose.

19. *Witnesses; Impeachment; Evidence Wrongfully Obtained.*—After the indictment was returned and the witnesses summoned for the trial, certain witnesses were summoned before the grand jury and examined, and at the trial, these witnesses appeared for the defendant, and their statements before the grand jury were shown for the purpose of impeaching their testimony as witnesses for defendant. Held, if the purpose of such procedure was to procure an examination by the grand jury of defendant's witnesses before his trial, it was an abuse of power of the grand jury, but such fact would not preclude the state from utilizing evidence thus procured, for impeaching purposes.

20. *Same; Credibility; Intoxication.*—The evidence of a witness cannot, as a matter of law, be disregarded because the witness was somewhat intoxicated at the time of the occurrences testified to by him, although that fact may be shown and considered by the jury in determining the credibility to be given to such testimony.

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21. *Evidence; Attempt to Suppress Truth.*—Evidence that a defendant requested a witness "not to tell anything, and that he could have what he wanted," was admissible as tending to show an effort to suppress the truth; the defendant having a right to give the statement an innocent meaning if he could do so.

22. *Charge of Court; Reasonable Doubt.*—A charge asserting that if the evidence for the state consists of the statements of witnesses of the truth of which the jury have a reasonable doubt, they cannot convict defendant is properly refused as a misleading statement of the doctrine of reasonable doubt; the jury being authorized to convict although it may not believe everything testified to by witnesses for the state.

23. *Same; Abstract Instructions.*—There is no error in refusing abstract instructions.

24. *Homicide; Instructions; Degree.*—A charge asserting that if the jury was reasonably doubtful as to the proof of any material allegation of the indictment, they must acquit, was misleading in a homicide case, as the offense charged included every minor offense of which defendant might be convicted.

25. *Same; Self-Defense.*—If defendant brought on the difficulty, the manner of his invitation to deceased to come around the corner, etc., would not excuse him from bringing it on; hence, a charge predicating the right of self-defense on the peaceable manner in which defendant asked deceased to come around the corner, was properly refused.

26. *Same.*—A charge of self-defense which is defective because premitting defendant's belief that he was in peril at the time of the killing, was properly refused.

27. *Same; Duty to Retreat.*—Where a defendant is free from fault in bringing on a difficulty he is under no duty to retreat unless he can do so with reasonable safety and without increasing his danger.

28. *Same.*—Charge 10 examined and it is held that while the latter part of the charge was defective for not clearly stating the necessity of defendant's freedom from fault as a condition to his right not to retreat, yet when construed with the first part of the charge, this deficiency is supplied, and that the instruction as a whole was correct, and should have been given, under the evidence in this case.

29. *Criminal Law; Showing Error; Burden of Proof.*—The burden of showing error is upon an appellant, but where error is shown in a criminal case, the burden of showing that it did not injure defendant is upon the state.

(McClellan and Somerville, JJ., dissent in part.)

APPEAL from Gadsden City Court.

Heard before Hon. JAMES A. BILBRO.

Jay Smith was convicted of first degree murder, and appeals. Reversed and remanded.

The defendant was indicted and tried for killing one Will A. Patterson with a pistol. The witness Cox tes-

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tified that there had been trouble between deceased and defendant, and that he had been with defendant for about 30 minutes before the shooting took place, but that just before the shooting took place he had gone into the drug store, but that he heard the defendant in a seemingly friendly manner ask deceased to come around behind the store, that he wanted to see him a minute, and heard deceased decline to go with him into the dark, but told him that if he wanted to see him to come into the light in the drug store; that Mr. Felix Walker then said to the deceased, "Come on, Patterson, and I will go with you," Walker being with Smith at the time, and a few minutes afterwards the pistol fired several times, and witness saw Patterson reel and fall on the sidewalk; that Walker was standing between the two, with his right side to Patterson and his left side to Smith; and that Walker was shot in the melee.

Testifying for the state, Felix Walker said: "I was with Smith at the time Patterson was killed at night, at or about the corner of Martin's drug store in Alabama City. About the time I got to the corner Smith came up, but I did not see Patterson. A little later I saw Patterson come out of the barber shop, and come across and start into Martin's drug store, and Smith said to him, 'Pat, I want to see you a minute; come out in the street.' Patterson replied, 'Come on in the light,' and Smith told him to come on down the street, but Patterson turned and walked back to the door, and I said, 'Yes,' or "I will go with you," I don't remember which, and we stepped out on the sidewalk, and Mr. Smith pulled up his coat and turned round and said, 'You see I ain't got any gun,' and Patterson says, 'Yes, Jay, you have got a gun.' Witness saw the gun as Smith turned around, and walked over to Smith to get him to go off. I told him to come and let's go off. Patterson said noth-

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ing, and I don't think Smith said anything. Smith then threw his hand on his gun, and I threw my hand to his gun, and said to him, 'Don't take your gun out.' He jerked twice, and the gun fired and struck me in the leg, and I pitched out in the street, and Smith got his gun out of his pocket, but Patterson drew no gun. After I was shot I was unconscious, and when I came to myself I was lying with my head in Smith's lap."

The witness was asked on cross-examination: "You saw the pistol when Smith turned around?" and replied in the affirmative. The defendant then asked, "Patterson could have seen it?" The state objected to the question, and the objection was sustained, and defendant excepted.

The following charges were refused to defendant:

(1) "If the evidence of the state consists of the statement of witnesses of the truth of which the jury have a reasonable doubt, you cannot convict the defendant."

(2) "The court charges you that, if you are reasonably doubtful as to the proof in this case of any material allegation of the indictment, you must acquit the defendant."

(6) "If the jury believe from the evidence that the state's witness Walker was drunk or under the influence of liquor at the time of the shooting of Patterson, then the jury may disregard the testimony of said Walker entirely."

(7) "The court charges the jury that if you believe from all the evidence in this case that it was communicated to the defendant prior to the difficulty that deceased wanted to see him at or near the place where he was killed, and defendant went to said place under the belief that deceased was desirous of seeing him there, and for no hostile or other improper purpose, and did approach the deceased in a peaceable and orderly man-

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ner, and was without fault in bringing on the difficulty with the deceased, and the deceased stated to the defendant in substance that he did not want to talk to him, that defendant had a pistol, and defendant stated to the deceased that he did not have a pistol, and deceased immediately started to draw and did draw a pistol from his person and fired upon or in the direction of defendant, and it reasonably appeared to defendant at the time he could not retreat with reasonable safety to himself, and it further reasonably appeared that he was in imminent danger of life or limb at the hands of deceased, and under such circumstances the defendant fired upon and killed the deceased, then I charge you the defendant had violated no law, and it will be your duty to return the following verdict: "We, the jury, find the defendant not guilty."

(8) "If you believe from the evidence that defendant, in a peaceable manner, asked deceased to come around the corner, that he wanted to see him, and deceased, on going around the corner, stated to defendant that he had a gun on him, and that defendant pulled up his coat and stated to deceased that he did not have a pistol, and deceased then started to draw his weapon, and it reasonably appeared to the defendant that he was in serious danger to life or limb, and that he could not retreat with reasonable safety, the jury should acquit the defendant."

(9) "If you find after a consideration of all the evidence that deceased was a man of violent, dangerous, or bloodthirsty general character, and had made threats to take the life of defendant before the moon went down that night, and these threats were communicated to defendant before the shooting, and defendant was free from fault in bringing on the difficulty, and that at the time he fired the fatal shot it reasonably

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appeared to him that he was in imminent peril of life or limb at the hands of deceased, and there appeared no reasonable mode of escape from such impending peril, then I charge you the defendant had the right to shoot to kill, and, further, to act more readily upon appearances than if deceased had been a man of peace and quiet in the community in which he lived."

(10) "If defendant was free from fault in bringing on the difficulty, he was under no duty to retreat, unless you believe that he could have retreated without increasing his danger or with reasonable safety. It is not necessary, under the evidence in this case, that defendant should have been actually in danger of death or great bodily harm at the time he killed the deceased, or that retreat would have really increased his peril in order for him to have been justified in shooting the deceased. He had the right to act on the appearances of things at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of deceased in the light of any threats that the evidence proves deceased to have made against the defendant. If the circumstances attending the killing are such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believes such to be the case, then he had a right to shoot the deceased in his own defense, although, as a matter of fact, he may have been in no actual danger, and retreat would not have endangered his personal safety; and if the jury believe that defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty was on the state, and if not shown the jury must acquit."

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W. J. BOYKIN, and W. J. MARTIN, for appellant. The court erred in admitting evidence as to the size of the caliber of the pistol with which the killing was done.—Wigmore on Evid. sec. 555; 26 N. W. 291; 97 N. Y. 507; *B. E. Co. v. Ellard*, 135 Ala. 433; *Price v. State*, 100 Ala. 144; *Torrey v. State*, 113 Ala. 496; *A. G. S. v. Burgess*, 119 Ala. 555; *Sanders v. State*, 2 Ala. App. 23. The court erred in refusing to permit plaintiff to show on the cross of the witness Walker that deceased could have seen defendant's pistol.—*Gordon v. State*, 140 Ala. 32. The court erred in permitting threats of defendant towards deceased to be shown, and also erred in permitting it to be shown that defendant was connected with running a blind tiger, as all of such matters has reference to details of a previous difficulty between defendant and another person.—*Gordon v. State*, *supra*; *Harkness v. State*, 129 Ala. 71; *Rutledge v. State*, 88 Ala. 85; *Stanfield v. State*, 3 Ala. App. 59. The court erred in admitting the declarations of deceased.—*Kirby v. State*, 89 Ala. 63; *Moses v. State*, 88 Ala. 78; *Long v. State*, 2 Ala. App. 97; *Green v. State*, 96 Ala. 32; *Rollins v. State*, 160 Ala. 87. The clothing were inadmissible.—*Rollins v. State*, *supra*; *Robinson v. State*, 108 Ala. 14; *Pearson v. State*, 97 Ala. 219. The statements were inadmissible because not a part of the *res gestæ*.—*Simmons v. State*, 129 Ala. 41; *Harkness v. State*, 129 Ala. 71; *Williams v. State*, 130 Ala. 107; *Stallings v. State*, 142 Ala. 112; *Reeves v. State*, 158 Ala. 5. The court erred in its action in permitting witnesses for defendant to be impeached by statements alleged to have been made by them when called before the grand jury after the indictment had been found.—*State v. Blocker*, 14 Ala. 453; *Banks v. State*, 78 Ala.; *Thompson v. State*, 99 Ala. 173; *Fields v. State*, 121 Ala. 16. Charge 1 should have been given.—*Mills' Case*, 55

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South. 332. Charge 8 should have been given.—*DeArman's Case*, 71 Ala. 351. Charge 10 was improperly refused.—*Blewett's Case*, 161 Ala. 16; *Snyder's Case*, 145 Ala. 33; *Green's Case*, 156 Ala. 29; *Davidson's Case*, 167 Ala. 68; *Anderson's Case*, 159 Ala. 14. Charge 11 should have been given on these authorities.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

SAYRE, J.—Defendant was convicted of the murder of one Patterson, and sentenced to suffer death. At his trial defendant reserved a great number of exceptions to adverse rulings on questions of evidence. They have been duly considered, but it has been found unprofitable to state them severally, and impossible to do so within reasonable limits. We have, however, stated such of them as seem to involve questions of merit, and perhaps some besides.

Dr. Burns, a witness for the state, was permitted to give his opinion as to the caliber of the pistol ball which caused the death of deceased. This he appears to have done from an inspection of the fatal wound. He was a medical man of ample general experience, but his observation of things in more immediate point had been meager, and possibly his opinion in that particular was not of much moment; but if it be conceded that his qualification as an expert in the matter of calibers was unsatisfactory, still, considering that defendant did not deny that he had caused the death of deceased by shooting him with a pistol, it is not perceived how the doctor's more intimate knowledge and better grounded judgment in the matter of wounds as demonstrating the caliber of the weapons by which they are inflicted could have been of any benefit to the defendant. In fact, the

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progress of the case developed no real reason for the question about the size of the bullet. True, as suggested, a third person also received an unintentional wound, and, under the circumstances, the question whether his wound came from the weapon in the hand of defendant or that in the hand of deceased would have been of significance as tending to show that deceased fired a shot, which some of the testimony seemed to deny, and possibly, also, in one event as tending to show who fired the first shot; but on that inquiry the mere caliber of the weapon inflicting the wound upon deceased shed no light, nor, in view of the admitted facts, did it serve any other indispensable purpose of the defendant.

On consideration of the conditions shown to have existed at the time, a statement of which in full detail we will leave to the reporter, we are not willing to affirm reversible error of the trial court's rulings in refusing to allow the witness Felix Walker to answer defendant's question whether deceased could have seen defendant's pistol. It appeared throughout the case that defendant and deceased had each made threats against the life of the other. Both were armed in anticipation of a meeting. Late in the afternoon before the killing, deceased, who was a police officer, had arrested defendant, and upon that occasion defendant had threatened the life of deceased. The testimony of this witness went to show that when the parties met some hours afterward, deceased, after demurring, had, on defendant's invitation—made, it seems, in a friendly manner—gone around the corner into a place not so well lighted as the street from which they went, where defendant pulled up his coat, and, turning around, said to deceased, "You see I ain't got any gun." Defendant contends that his question, which followed should have had an answer because, if in the affirmative, it would have supported

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his insistence that as soon as deceased discovered that defendant was armed the former determined and attempted to kill, before the latter could get his pistol into action. There are cases which seem in principle to uphold the defendant so far as concerns the competency of the answer.—*Cox v. State*, 78 Ala. 66; *E. T. V. & G. R. R. v. Watson*, 90 Ala. 41, 7 South. 813; *McVay v. State*, 100 Ala. 110, 14 South. 862; *A. G. S. R. R. v. Linn*, 103 Ala. 134, 15 South. 508; *Rollings v. State*, 136 Ala. 126, 34 South. 349; *Adler v. Pruitt*, 169 Ala. 213, 53 South. 315, 32 L. R. A. (N. S.) 889. But in the present case it is certain that defendant had his weapon then on his person, though not in the hip pocket exhibited to deceased. The witness saw it, and the deceased no doubt saw it, for he said, "Yes, Jay, you have got a gun." The evidence of this statement by the deceased was corroborated by the defendant. While it was a question for the jury whether deceased saw defendant's weapon, and acted upon the idea suggested in argument, it is not perceived how proof of defendant's failure to deceive deceased in respect to his possession of a weapon could have materially advanced the cause of the defense, or how the witness' statement of his opinion, or shorthand rendering of the facts as it may be called, which, under the circumstances, was weak and inconclusive at best, could have materially affected the jury's finding in the presence of abundant proof otherwise that deceased was aware of the fact that defendant was armed. We feel justified, therefore, in saying that this ruling was not error for which a reversal should be ordered.

The witness Kane was brought forward to prove threats made by defendant at the time of his arrest by deceased in the afternoon. This witness also testified to what deceased said to defendant at the same time. Later on, however, the court, responding to defendant's

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motion, ruled: "I exclude everything except what the defendant said." Defendant complains in his brief that at several points the trial court adopted this method of curing errors. The practice has been regarded by this court as not to be commended, but the ruling in similar cases has been that an objection to testimony, erroneously admitted in the first instance, is not available on appeal, where the testimony is afterwards excluded with instructions to the jury not to regard it.—*Jackson v. State*, 94 Ala. 85, 10 South. 509; *Green v. State*, 96 Ala. 32, 11 South. 478. Here no such instruction was given. We feel constrained, however, to say that at this particular point no error is shown by the bill of exceptions. This court has heretofore adhered to a strict rule of exclusion in respect to the attendant circumstances of threats made previous to the occasion of the act charged.—*Harkness v. State*, 129 Ala. 71, 30 South. 73; *Willingham v. State*, 130 Ala. 35, 30 South. 429; *May v. State*, 167 Ala. 36, 52 South. 602. But it is evident that the strictness of the rule must of necessity be relaxed in some cases.—*Linehan v. State*, 113 Ala. 70, 21 South. 497; *Gunter v. State*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17. It may happen that a threat will be conveyed by words which mean nothing without the surroundings. That a threat is coupled with a condition affects its weight, but not its admissibility (*Cribbs v. State*, 86 Ala. 613, 6 South. 109); and, we take it, the state may be allowed, without invading the rights of defendant, to show the meaning of the condition, where that does not appear on the face of the threat. To illustrate: Defendant, according to one witness, had said to deceased: "If you get in here, I will kill you." It does not seem improper, certainly it contributes to an understanding of the true meaning of such an occasion, to show that deceased was trying to arrest defendant,

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who was at the time in a buggy and starting to drive away. In this case, for anything appearing in the record, those details to which defendant objected, insignificant in themselves, were brought out by questions which should have put him on guard and should have evoked his objection; but objection was made only by motion to exclude after the matter had reached the jury. The charge of error cannot be sustained under these circumstances.

As for the details of the difficulty between defendant and the witness Kane, which gave occasion for the defendant's arrest by deceased, they were not admissible over the defendant's objection. But if defendant, conceiving that he might thereby get some credit with the jury, took the initiative in eliciting some part of them, he opened the door for the entire *res gestæ*, lest the jury be misled by an incomplete or garbled version. The bill of exceptions states that the particulars to which defendant objected were admitted for the reason that defendant had drawn out other particulars. The bill is of difficult comprehension, but as well as we can understand it the court's assigned reason was justified by the fact. In fact, as we read the transcript, defendant's breach into the field of particulars was as wide as a church door, and the state had the right to go in through it. And as to much of it, particularly that part of it which defendant complains was most prejudicial to him as tending to create the impression that he had been concerned in "running a blind tiger," at one point the defendant again waived objections by waiting to interpose them until the question had been answered. The question was general; but the answer was not irresponsible. This matter was calculated to prejudice the defendant, and the court might well have excluded it, but in the shape the matter took defendant waived his right

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to have it excluded.—*Liner v. State*, 124 Ala. 1, 27 South. 438; *Jarvis v. State*, 138 Ala. 17, 34 South. 1025. At another point there was timely objection to the question, but no exception to the court's ruling. For these reasons we are unable to hold consonantly with the rule heretofore followed in this court that reversible error intervened at this point.

After deceased had been shot he staggered and was helped into the drug store immediately at hand, where he died within a few minutes. As he lay upon the floor he said, "Boys, he has killed me." Defendant excepted to the reproduction of this statement. The nature of his wound the form of his statement, and the absence of any expression of hope were sufficient to warrant an inference that deceased realized his condition and spoke under a sense of impending dissolution. In truth, the statement was nothing more than an expression of his appreciation of the fact that he was wounded to death. It gave no information as to the identity of his assailant, nor as to the circumstances of the assault. Properly weighed, it was of no value to the state, nor harmful to the defendant. If, however, it be considered to have shed light upon the case, it was properly admitted as a dying declaration.—*Gerald v. State*, 128 Ala. 6, 29 South. 614.

The prosecution was permitted to show that about 10 minutes after the death of deceased, and while his body still lay upon the floor of the drug store, his little boy, who had come to the scene, was crying and asked of no person in particular, it seems, "Is my papa dead?" and that defendant said, "Yes, old Pat's dead, son." The defendant excepted. At another place in the transcript a similar exception is shown to have been reserved on the examination of a different witness as follows: "Here the solicitor asked the witness the following ques-

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tion, viz. 'I will ask you if Jay Smith, in reply to Mr. Patterson's little boy over the dead body of that man, he says in this way, says, "Yes, son, old Pat's dead; old Pat's dead"' (solicitor raising his voice as he repeated the word). To this question the defendant objected because illegal, irrelevant, incompetent, immaterial, and inadmissible. The court overruled the objection, and the defendant excepted. The witness answered, 'Yes, sir.' The defendant moved the court to exclude the answer of the witness upon the same grounds interposed to the question; but the court overruled the motion, and the defendant excepted. Witness further stated that was the tone of voice the defendant used. The solicitor continued, 'I will ask you how Smith said it?' The defendant objected to the question, and the court overruled the objection, and the defendant excepted. The solicitor asked the witness, "What did Smith say?" and the defendant objected to what Smith said; but the court overruled the objection, and the defendant excepted. The witness then, in answer to the question objected to by the defendant, said: 'He said: "Old Pat's dead; old Pat's dead; old Pat's dead,"'—three times. Here the defendant moved the court to exclude the answer of the witness because illegal, immaterial, incompetent, and inadmissible, and because no sufficient predicate had been laid, and because not shown to be a part of the *res gestæ*; but the court overruled the motion, and the defendant excepted." The statement attributed by the testimony to defendant was no part of the homicidal act nor of the circumstances so immediately attending the act as to constitute it a part of the *res gestæ*. Most likely, if defendant at the time had made some exculpatory declaration, it would have been excluded because self-serving.—*Kennedy v. State*, 85 Ala. 326, 5 South. 300. But evidence may be capable of different construc-

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tions, and we cannot say that this had no tendency to show defendant's hostility at the time of the declaration, and from that the jury may have inferred hostility at the time of the killing. "Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is, in general, plainly admissible. * * * Subsequent hostility is equally receivable."—1 Wigm. on Ev. § 396. Our cases sustain this proposition.—*McManus v. State*, 36 Ala. 285; *Henderson v. State*, 70 Ala. 29; *Walker v. State*, 85 Ala. 7, 4 South. 686, 7 Am. St. Rep. 17. There must be a limit of the time intervening between the time of the hostile expression and that of the act sub judice, beyond which proof of this character ought not to be received; but that must be trusted in some degree to the discretion of the trial court. We have stated our opinion that the expression shown in this case may have been construed by the jury as indicating hostility to the deceased, and, this being so, it followed so closely upon the homicidal act that no objection could be sustained to it for remoteness in point of time. Though probably its legitimate effect as evidence of malice was small, its just interpretation and the weight to be assigned to it were matters for the jury.

Defendant's statement to or request of the witness Walker to the effect that he was "not to tell anything, that he could have what he wanted," and the several slightly variant versions of it were properly admitted. They bore the aspect of an effort to suppress the truth, or pervert the course of justice. If these expressions were capable of an innocent meaning, and in fact defendant meant no harm, that was a question for the jury.

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The clothing worn by deceased showed the location of the wound upon his person and, clearly, was admissible in evidence.—*Rollings v. State*, 160 Ala. 82, 49 South. 329.

Defendant appeared at the trial with one leg—he had lost the other prior to the killing. There was no error in allowing the state to show that when he killed deceased he was moving about on two legs—one a wooden leg. There is no room for question about that. But defendant claims the proof was intended and calculated to operate unfairly for him as amounting to an assertion that he was attempting to play upon the sympathies of the jury. Defendant was allowed to offer his explanation. And of this, as of other parts of the evidence of which defendant makes complaint as tending to arouse prejudice against him, it must be said that, being admissible for a lawful purpose, it could not be excluded because capable of being distorted to unfair and prejudicial uses. Defendant's remedy against perversion was, with the aid of the court, to direct the jury's attention to the legitimate purposes and legal effect of the testimony.

Defendant devotes some part of his argument to the fact, which appeared in evidence, that after the indictment against him had been returned into court, and witnesses summoned for the trial, his witnesses were brought before the grand jury and examined touching their knowledge of the case. At the trial statements made under these circumstances were shown for the purpose of impeaching the testimony of defendant's witnesses. It does not occur to us that the course here indicated could have been taken with any proper and lawful purpose. None appears in the bill of exceptions. At least we will say that if the purpose was in this, as the only possible way having an appearance of legit-

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imacy, to procure an examination of defendant's witnesses in advance of the trial, the practice indicated a misconception of official duty and an abuse of the powers of the grand jury. But this cannot excuse the witnesses, nor preclude the state.

Charge numbered 1, and refused to defendant, was a misleading statement of the doctrine of reasonable doubt, and there was no error in its refusal. The jury might well have convicted defendant, although they may not have believed everything testified to by the witnesses for the State.

So, also, of charge 2. We have a long line of decisions condemning the charge as misleading in homicide, and other cases in which the offense charged includes other offenses of minor grade of which the defendant may be convicted.—*Stoball v. State*, 116 Ala. 454, 23 South. 162; *Burkett v. State*, 154 Ala. 19, 45 South. 682; *Parham v. State*, 147 Ala. 57, 42 South. 1.

Of course it will not do to say that the jury may discard the evidence of a witness who is shown to have been under the influence of liquor, it may be to a slight degree, at the time of the occurrences to which he undertakes to testify; though that circumstance may weigh against his credibility. No error as to charge 6.

Charge 7 was abstract in several particulars.

Defendant's mere manner in inviting deceased around the corner will not suffice to relieve him of fault in bringing on the difficulty, if in fact his purpose was there more safely to kill him, as the jury may have inferred. No error as to charge 8.

Charge 9 was bad. It was abstract in part, and in part defective for pretermittting defendant's belief that he was in peril.

Our first opinion was that charge 10, refused to the defendant, was involved and confusing. Upon recon

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sideration we have reached the conclusion that the charge correctly and with reasonable clearness stated principles of law applicable to the tendencies of the evidence for the prisoner, that its refusal was error the injury of which is not refuted by the record, and that in consequence the judgment of conviction must be reversed. Defendant framed this charge by conjoining two charges which had the approval of this court in *Bluett v. State*, 151 Ala. 41, 44 South. 84. So much of it as instructed the jury that 'if the defendant was free from fault in bringing on the difficulty, he was under no duty to retreat, unless you believe he could have retreated without increasing his danger or with reasonable safety' (charge 8 in the *Bluett Case*, *supra*) unquestionably contained a correct statement of the law. To this defendant added, so as to make one connected instruction, a copy, mutatis mutandis, of a charge for the refusal of which Bluett twice secured reversals in this court.—151 Ala. 41, 44 South. 84; 161 Ala. 14, 49 South. 854. Notwithstanding the second member of the charge refused to the defendant in the case under consideration—charge 26 in the record shown in 151 Ala.; charge 13 in the record shown in 161 Ala.—has been twice approved, we are inclined to think it is defective because, premitting any clear statement of the necessary hypothesis of defendant's freedom from fault as a condition precedent to his right to stand his ground, this part of the charge, to state its substance in a few words, predicated defendant's right to shoot and to a verdict of acquittal upon his reasonable and honest belief that he was in danger of life or limb, and that he could not retreat without adding to his peril. It does properly state the burden of proof in respect to defendant's freedom from fault; but it fails to make any clear affirmation of the fact that defendant's right to stand his

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ground depended upon his freedom from fault in bringing on the difficulty. That is left to inference. But this deficiency in the charge was in this case supplied by the addition of the first member which, as we have said, correctly stated the doctrine of retreat as affected by freedom from fault; the two together constituting a correct statement of the law of self-defense. Under the tendencies of defendant's evidence he was entitled to have that law stated to the jury in a special charge. The bill of exceptions informs us that the court on defendant's request gave numerous special charges, and it may be that defendant thereby had the benefit of every principle involved in the charge in question. But those charges have not been certified to this court, as they might have been, and we cannot know that any of them covered this charge. The burden of proving error rests upon the appellant. Error shown, the burden of proving that it did no injury to appellant rests upon the state. For the error in refusing this charge, the judgment of conviction will be reversed.

We find no other reversible error.

Reversed and remanded.

ANDERSON, MAYFIELD, and DE GRAFFENRIED, JJ., concur. MCCLELLAN and SOMERVILLE, JJ., dissent as to the finding of error in the refusal of charge 10. DOWELL, C. J., not sitting.

[Ex Parte Robinson.]

Ex Parte Robinson.**Murder.**

(Decided May 15, 1914.—63 South. 177.)

1. *Verdict; Surplusage.*—Under section 7620, Code 1907, if the verdict improperly fixes the place or character of confinement of defendant, that part may be treated as surplusage and the judge may sentence defendant to the place named in the statute, or may use his discretion, if discretion is permitted.

2. *Same.*—If the verdict improperly fixes the place of confinement and in accordance therewith, the judge sentences defendant to a place other than that directed by section 7620, Code 1907, the error is in the sentence and not in the judgment of conviction, as that part of the verdict fixing the place of confinement should have been rejected as surplusage.

3. *Appeal and Error; Review; Remandment.*—Where there was no error in the judgment of conviction, but there was error in the sentence imposed, the judgment will not be reversed except as to the sentence, and the case will be remanded for resentence only, the object being to place the case before the trial judge for correct action beginning at the point of his erroneous departure.

CERTIORARI to Court of Appeals.

Carson Robinson was convicted of manslaughter in the first degree, and on appeal to the Court of Appeals, the cause was remanded to the lower court for resentencing, but in other respects affirmed, as will appear by reference to *Robinson v. State*, 6 Ala. App. 13; 60 South. 558. He petitions the Supreme Court to review said judgment of the Court of Appeals. Certiorari denied.

ETHERIDGE & LAMAR, for appellant. The verdict did not support the judgment entered, and defendant was erroneously sentenced.—*Zaner v. State*, 8 South. 698; *Ex parte Thomas*, 113 Ala. 1; *Henderson v. State*, 98 Ala. 45; sec. 7620, Code 1907.

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R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General for the State. The sentence only is erroneous, and hence, only the sentence will be reversed, and the cause remanded to the lower court for proper sentence.—*Washington v. State*, 117 Ala. 30.

SOMERVILLE, J.—The petitioner seeks by writ of certiorari to review and reverse the decision of the Court of Appeals in *Robinson v. State*, 6 Ala. App. 13, 60 South. 558. The petition and the record show that petitioner was convicted in the city court of Bessemer of manslaughter in the first degree by the verdict of a jury, which fixed his punishment at one year in the penitentiary, and that by the judgment of the court he was sentenced in accordance with the verdict. On appeal it was at first the judgment of the Court of Appeals that the verdict of the jury was not authorized by law, and was incapable of sustaining a judgment of conviction, and, further, that this defect was available to defendant on appeal, and required a reversal of the entire judgment.—*Robinson v. State*, 6 Ala. App. 13, 60 South. 558. These conclusions were based on section 7620 of the Code, and the cases of *Zaner v. State*, 90 Ala. 651, 8 South. 698, *Ex parte Goucher*, 103 Ala. 305, 15 South. 601, and *Ex parte Thomas*, 113 Ala. 1, 21 South. 369. Upon a reconsideration of the case, however, the former judgment of remandment for a new trial was set aside, and there was entered a judgment of remandment merely for resentence by the trial court, either to imprisonment in the county jail or to hard labor for the county, as directed by the statute.—Code, § 7620.

This conclusion was reached under the influence of the ruling of this court in *Washington v. State*, 117 Ala.

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30, 23 South. 697, and the language of the opinion in that case. It is the contention of petitioner that the final judgment of the Court of Appeals in effect overrules *Zaner v. State* and *Ex parte Goucher, supra* and that it is not supported by the decision and views expressed in *Washington v. State, supra*. Section 7620 of the Code makes provision for the sentence of convicts in three distinct categories: (1) "In all cases in which the period of imprisonment in the penitentiary or hard labor for the county is more than two years, the judge must sentence the party to imprisonment in the penitentiary"; (2) "in all cases of conviction of felonies in which such imprisonment or hard labor is for more than twelve months, and not more than two years, the judge may sentence the party to imprisonment in the penitentiary, or confinement in the county jail, or to hard labor for the county, at his discretion"; (3) "in all cases in which the imprisonment or sentence to hard labor is twelve months or less, the party must be sentenced to imprisonment in the county jail or to hard labor for the county." It will be observed that the action of the jury is restricted to fixing the *duration of the term* of the imprisonment or hard labor; that under the first provision the judge has no discretion as to the *place* of imprisonment or labor; that under the second provision the judge may exercise a discretion as to the place of imprisonment, and as to the imposition of imprisonment or hard labor; and that under the third provision the judge has no discretion as to the place of imprisonment, but only as to the imposition of imprisonment or hard labor. The instant case falls within the third provision of the statute, with respect to which it has been distinctly ruled that a verdict of conviction and imprisonment for one year in the penitentiary does not authorize a sentence to the penitentiary for that

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term, and that on appeal such a judgment must be reversed and the cause be remanded, not for a proper sentence, but for a new trial.—*Zaner v. State*, 90 Ala. 651, 8 South. 698. In a later case *Zaner v. State* was cited with approval, with the observation that the reception of such a verdict and the discharge of the jury, though the judgment be void, do not operate as an acquittal; the defendant being subject to trial anew.—*Ex parte Brown*, 102 Ala. 179, 15 South. 602.

Again, where upon a like verdict the judgment imposed a sentence to *hard labor for the county*, it was said that the court should not receive such a verdict until corrected, and that the record showed reversible error available by appeal or writ of error.—*Ex parte Goucher*, 103 Ala. 305, 15 South. 601. These decisions, standing alone, would seem conclusive in favor of the contentions of petitioner in the present case. But there are later cases in point. In *Evans v. State*, 109 Ala. 23, 19 South. 539, the verdict was: "We, the jury, find the defendant guilty of manslaughter in the first degree, and fix his punishment at 15 months in the penitentiary." The trial court sentenced the defendant to 15 months' hard labor for the county, and 10 months additional for the costs. This was held to be a correct practice, the court saying that "the judge had the discretion under this verdict * * * to sentence the defendant to 15 months—the period of imprisonment fixed by the jury—to hard labor for the county." In the later case of *Washington v. State*, 117 Ala. 30, 23 South. 697, the verdict was: "We, the jury, find the defendant guilty of manslaughter in the first degree, and we further assess his punishment at two years *hard labor for the county*." The judgment followed the verdict, and this court said: "The italicized words were mere surplusage. The court, before receiving the verdict, might

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have instructed the jury to omit them. * * * The futile attempt of the jury to fix the place or character of punishment imposed no restriction upon the discretion vested in the judge by section 5412 of the Code of 1896. * * * That the judge, in the exercise of his discretion, saw fit to select the place or character of punishment suggested by the surplusage of the verdict cannot affect the validity of the sentence." The opinion then proceeds to distinguish the case from that of *Zaner v. State*, saying of the *Zaner Case* that, "the sentence being illegal, the case was properly reversed." But it is also further declared that expressions in *Zaner v. State*, and *Ex parte Brown*, to the effect that the trial court could not pronounce a legal sentence on such a verdict, are not in harmony with later decisions, citing *Evans v. State, supra*.

These cases, *Evans v. State* and *Washington v. State*, very clearly assert two propositions: (1) When the verdict properly fixes the term of punishment and improperly specifies also its place or character, the latter specification is but surplusage, and may be disregarded by the court; (2) the verdict may be received by the court, and a proper sentence then and there adjudged for the term fixed by the verdict. Petitioner's insistence, however, is that these cases are to be distinguished from *Zaner v. State*, *Ex parte Brown*, and *Ex parte Goucher*, in that the former fall within the second clause of the statute, while the latter fall within its third clause; that under the second clause the trial court has *a discretion* as to the place and character of the punishment, and that it is this discretion to follow the verdict or to digress from it that frees the judgment and sentence in those cases from the vice imputed to a judgment and sentence upon a verdict which the court *may not lawfully follow*. On the surface, this distinction between

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the earlier and later cases might seem to be justified. But looking to the reason upon which *Zaner v. State* and the concurring cases are founded—viz., that it cannot be assumed that the term would have been thus fixed by the jury except in contemplation of the *place* and *mode* of the punishment they prescribe—it is obvious that the distinction suggested is but casual and superficial; for the reason given for the *Zaner* decision would, on principle, be equally applicable to all cases.

It is true the *Washington Case* declares that the sentence was illegal, and its reversal proper, in the *Zaner Case*, but it plainly repudiates the principle of the invalidity of the judgment in toto; for, certainly, if the trial judge may disregard the surplusage of the verdict and incorporate in the judgment of conviction a proper sentence notwithstanding, it necessarily follows that, failing to do so, his error begins, not with the judgment of conviction, but with the imposition of an unauthorized sentence. And so, logically, the judgment of conviction should not be reversed, but only the improper sentence, the object of remandment being merely to place the case again before the trial judge for corrected action *at the point of his erroneous departure*.

It results that, giving effect to the later decisions of this court, the case of *Zaner v. State*, 90 Ala. 651, 8 South. 698, is after deliberate consideration declared overruled upon this proposition; and concurrent expressions in *Ex parte Brown*, 102 Ala. 179, 15 South. 602, and in *Ex parte Goucher*, 103 Ala. 305, 15 South. 601, are disapproved.

It results also that the decision of the Court of Appeals in the case sub judice is approved.

The writ of certiorari will be denied. All the Justices concur, except DOWDELL, C. J., not sitting.

[Edgar v. The State.]

Edgar v. The State.

Murder.

(Decided June 12, 1913. 62 South. 800.)

1. *Jury; Venire; Service on Accused.*—A special venire in a murder case will not be quashed merely because in making out the copy to be served on defendant, the clerk wrote the name of two jurors improperly.

2. *Same; Excusing Jurors.*—Where a juror is excused by the court for good cause, it is not erroneous to fail to place the name of such a juror on the copy of the venire from which the jury is to be drawn.

3. *Same.*—The provisions of section 32, Acts 1909, p. 317, are mandatory, and where a juror is not excused and is present in court, the court may not refuse to place his name on the jury list merely because of a clerical error of the clerk in copying his name in the copy of the venire to be served on the defendant.

4. *Appeal and Error; Presumptions; Record.*—Where a reasonable intendment of the record clearly indicates that the thing did not exist, the court will not, in order to uphold the judgment, presume that such a thing might have existed.

APPEAL from Franklin Circuit Court.

Heard before Hon. C. P. ALMON.

Jesse J. Edgar was convicted of murder in the second degree, and he appeals. Reversed and remanded.

E. B. ALMON, and G. O. CHENAULT, for appellant. The provisions of section 32, Acts 1909, p. 305, are mandatory, and the court was in error in not requiring the name of the juror Bruton to be placed on the venire from which the jury was to be selected.—*Shepherd v. State*, 5 Ala. App. 178. The court was in error in refusing to quash the venire.—Acts 1909, p. 305.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The clerical error of the clerk in incorrectly copying the names of two of the jurors upon the venire to be served upon de-

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fendant did not authorize the quashing of such venire.—Acts 1909, p. 305; *Longmire v. State*, 130 Ala. 66; *Cauley v. State*, 133 Ala. 128; *Smith v. State*, 145 Ala. 17; *Untreinor v. State*, 146 Ala. 26. It was within the court's discretion to excuse the juror Bruton. In the absence of a showing to the contrary it will be presumed that the court excused the juror Bowen for just cause.—Code, section 7280; *Farriss v. State*, 85 Ala. 1; *Riley v. State*, 88 Ala. 193; *Hawes v. State*, 88 Ala. 39; *Sullivan v. State*, 102 Ala. 41; *Yarbrough v. State*, 165 Ala. 43; *Thomas v. State*, 124 Ala. 48; *Moseley v. State*, 107 Ala. 74; *Plant v. State*, 140 Ala. 53; *Gaines v. State*, 146 Ala. 16, 24; *Borden v. State*, 145 Ala. 1; *Williams v. State*, 144 Ala. 14, 17; *Williams v. State*, 147 Ala. 10, 23; *Calhoun County v. Watson*, 153 Ala. 554; *L. & N. R. R. Co. v. Young*, 168 Ala. 551, 560.

DE GRAFFENRIED, J.—In this case there was an indictment for murder. The defendant was convicted of murder in the second degree, and appeals.

1. There was a motion by the defendant to quash the venire upon the ground that a correct copy of the venire of jurors drawn and summoned for the week, "with a copy of the special venire of jurors drawn and ordered summoned for the trial of this cause, was not served upon the defendant as required by law and the orders of this court." The particular objection was that the names of Will J. Bruton, and James C. Bowen were drawn, summoned, and impaneled as jurors for the week in which the defendant's case was set for trial, that they were *then* in attendance upon the court, but that their names had been *omitted* from the copy of the venire which had been served upon the defendant, and did not appear upon such lists. The truth was that the clerk, in making out the copy *to be* served, and which

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was served upon the defendant, by a clerical misprision wrote the name Will J. Bruton, *Will J. Bryton*, and the name James C. Bowen, *James C. Brown*. This was a mere *clerical error*, and the court properly overruled the defendant's motion to quash the venire.—*Godau v. State*, 179 Ala. 27, 60 South. 908.

2. It appears that the court had excused the juror Bruton for good cause, and the court cannot be put in error for failing to have his name placed upon the lists from which the defendant's jury was drawn.

3. The trial court, however proceeded upon the theory that because of the mistake in the name of James C. Bowen, the defendant was not entitled to have the name of that juror placed upon the lists. It is argued on behalf of the state that we are, from this record, authorized to indulge the presumption that the juror James C. Bowen had also been excused by the court for good and sufficient cause. There is nothing in the record indicating that this juror had been excused. On the contrary, the record shows that the defendant objected to being forced to select a jury from the lists because of the absence of the name of said James C. Bowen from said lists, and that he reserved an exception to the action of the trial court in requiring him to select his jury from a list upon which *that* name did not appear. There is no reason why an appellate court should shut its eyes to the truth, or that it should say, in order that it may uphold the judgment of a trial court, that a certain thing *might have* existed when every reasonable intendment of the record which it has before it clearly indicates that the *thing* did not exist. Every record is entitled to an honest consideration, and there should be no dodging of an issue when the issue is fairly presented. We think that this record shows that the juror James C. Bowen was not excused by the

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court, that he was present when the defendant's trial was entered upon, and that his name was not placed upon the defendant's jury lists because the trial court was of the opinion that the *error* of the clerk, to which we have above adverted, had rendered it improper for his name to be placed upon the lists.

4. The act entitled "An act, to prescribe the qualifications of jurors," etc., approved August 31, 1909 (Pamph. Gen. & Loc. Acts, Special Session, 1909, pp. 305 to 320, inclusive), provides that: "Whenever any person or persons stand indicted for a capital felony, the court must on the first day of the term, or as soon as practicable thereafter, make an order commanding the sheriff to summon not less than fifty nor more than one hundred persons including those drawn and summoned on the regular juries for the week set for the trial of the case, and shall then in open court draw from the jury box the number of names required with the regular jurors drawn and summoned for the week set for the trial to make the number named in the order, and shall cause an order to be issued to the sheriff to summon all persons therein named to appear in court on the day set for the trial of the defendant and must cause a list of the names of all the jurors summoned for the week in which the trial is set, and those drawn as provided in this section, together with a copy of the indictment, to be forthwith served on the defendant by the sheriff, and the defendant shall not be entitled to any other or further notice of the jurors summoned or drawn for his trial nor of the charge or indictment upon which he is to be tried. On the day set for the trial, if the cause is ready for trial, the court must inquire into, and pass upon the qualifications of all the persons who appear in court in response to the summons to serve as jurors, and shall cause the names of

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all those whom the court may hold to be competent jurors to try the defendant or defendants to be placed on lists, and if there is only one defendant on trial shall require the solicitor to strike off one name and the defendant to strike off two names, and in case there are two or more defendants on trial the solicitor shall strike one and every defendant shall strike one name and they shall in this manner continue to strike names from the list until only twelve names remain thereon. The twelve thus selected shall be sworn and impaneled as required by law for the trial of the defendant or defendants." The above provisions are mandatory. The Legislature has the power to say how many jurors shall compose the venire from which the jury to try a capital case shall be drawn. The juror Bowen was on the venire from which the defendant's jury was to be drawn. He was present when the trial began. The trial judge did not require his name to be placed on the defendant's jury list. In fact it refused to permit his name to be placed on the list against the seasonable application of the defendant. The court's action in the premises was not due to an ascertained disqualification of the juror, but to an erroneous idea of the court that, because of a clerical error on the part of the clerk, to which we have referred, the defendant was not entitled to this juror. "When the legislative will is plainly and validly expressed, courts should and must obey that will, for it is the province of the Legislature, and not of the courts, to make a law."—*Sheppard v. State*, 5 Ala. App. 178, 59 South. 333. As was said by the writer of this opinion in the above-cited case: "The present jury law, of which the above subdivision forms a part, was intended to correct the abuses to which the system of trial by jury was subject under the laws which formerly prevailed in this state. In the practical administration of

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justice in every civilized community some form—some ceremonial—has been found to be *essential*, and we doubt if the time will ever come in the history of the race when all form and ceremonial can be laid aside by the courts and justice under the law be, at the same time, impartially administered.”

It is evident that the trial court committed an error in refusing to have placed the name of the juror Bowen upon the list from which the defendant's jury was selected, and that for that error the judgment of the court below must be reversed, and the defendant awarded a new trial.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ.,
CONCUR.

McGay v. The State.

Murder.

(Decided June 30, 1913. 63 South. 70.)

1. *Bill of Exceptions; Filing; Time.*—Under section 3019, Code 1907, a bill of exceptions presented 91 days after judgment has been entered, is not filed in time, and will be stricken on motion.

2. *Appeal and Error; Record; Matters to be Shown by.*—Where no bill of exceptions was in the record, the action of the trial court in striking the plea of defendant cannot be reviewed, since such action must be presented by the bill of exceptions.

3. *Same; Harmless Error; Pleading.*—Where the record shows elsewhere that defendant pleaded not guilty, and that the question of his guilt or innocence was properly submitted to the jury, the error of the judgment entry in showing that defendant's plea of not guilty was erroneously stricken, was harmless.

APPEAL from Marengo Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

[McGay v. The State.]

Joseph McGay was convicted of murder and he appeals. Affirmed.

I. I. CANTERBURY, and E. E. TAYLOR, for appellant. No brief reached the Reporter.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The bill of exceptions should be stricken because not filed until 91 days after judgment was entered.—*McOllister v. State, infra*. There is no error apparent of record, and the cause should be affirmed.

ANDERSON, J.—This case was submitted on the merits and the motion of the state to strike the bill of exceptions.

Section 3019, in part, says: "Bills of exceptions may be presented at any time within ninety days from the day on which the judgment is entered, and not afterwards," etc. The judgment in this case was entered January 9, 1913, and the bill of exceptions was presented April 10, 1913, 91 Days after the entry of the judgment, and, upon the authority of *McOllister v. State, infra*, 62 South. 767, the motion to strike the same is sustained. As the bill of exceptions must be stricken, and as the record proper discloses no reversible error, this case is affirmed.

The judgment entry of January 9th indicates that the trial court struck the defendant's plea of "not guilty" because not filed by 6 o'clock of the previous afternoon, and if this was true it was highly improper, yet the action of the trial court in striking a plea cannot be reviewed except by a bill of exceptions.

Moreover, while the entry of January 9th indicates that the plea of not guilty was stricken because not filed by 6 o'clock of the previous day, the record in fact

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shows that the defendant interposed such a plea when arraigned on the 6th, and it also appears that his guilt or innocence was submitted to and passed upon by the jury.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Roberson v. The State.

Murder.

(Decided June 12, 1913. Rehearing denied June 30, 1913.
62 South. 837.)

1. *Former Jeopardy; Acquittal of Higher Degree.*—A conviction of a lesser degree of crime than that charged in the indictment is an acquittal of a charge of any higherer degree of the same offense, although the judgment of conviction of the lesser degree is reversed on appeal.

2. *Same; Failure to Plead; Waiver.*—To be available the defense of former jeopardy must be specially pleaded, and unless so pleaded, a defendant is held to have waived his right thereto.

3. *Jury; Special Venire; Rule of Court.*—Under rule 30 of the circuit and inferior court practice, an entry reciting the appearance of the prosecutor and defendant in person and by attorney, and that defendant on arraignment pleaded former acquittal of murder in the first degree as an answer to the indictment, and that such plea was sustained, and defendant was put on trial for murder in the second degree, was such a substantial compliance with the requirements of the rule as to avoid the necessity of a special venire for the subsequent trial.

4. *Homicide; Instructions.*—An instruction that mercy and sentiment did not rest with the jury, was neither improper nor erroneous in a homicide case.

5. *Same; Evidence.*—Where defendant was being tried for murder in the second degree, evidence that defendant had encouraged a son of the deceased to kill his father, was admissible as the court was without power to exclude it because it was unnatural or unreasonable.

6. *Same; Relation of Partics.*—Evidence that deceased was a witness against defendant in a cause then pending, and that defendant

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knew such fact at the time he killed deceased, was both relevant and competent.

7. *Same; Element of Offense.*—In order for a homicide to be a murder it must have been committed with malice aforethought.

8. *Same; Burden of Proof.*—Malice being an essential element of murder, and the presumption of innocence including freedom from malice as well as innocence of the act causing death, proof of homicide alone does not necessarily establish that he who caused the death was guilty thereof, since the killing may have been either murder or manslaughter, or excusable or justifiable homicide.

9. *Same; Self-Defense.*—The burden is on defendant to show a necessity, real or apparent, to take life, unless the evidence which proves the homicide also shows the excuse or justification; when, therefore, a defendant has established such necessity without an opportunity to retreat safely, the burden is on the state to show that defendant was at fault in bringing on the difficulty.

10. *Evidence; Experts; Subjects of Inquiry.*—Whether the inner lining of the skull could be fractured without fracturing the outer lining thereof, was a proper subject for expert testimony.

11. *Same.*—A witness who had been a practicing physician for twenty-four years, and shown to be otherwise qualified to testify, was competent to give his opinion whether the inner lining of the skull might be fractured, without fracturing the outer lining.

12. *Witnesses; Competency.*—Where defendant voluntarily testified as a witness, it was competent for the state to show by him that deceased was a witness against him in a pending case, which fact was known to him at the time he killed deceased.

13. *Charge of Court; Stating Testimony.*—It was not error for the court while instructing the jury as to the law of the case to state to them that defendant had testified that deceased was a witness against him in a pending cause, and that defendant knew this when the killing occurred.

14. *Same; Presumption of Innocence.*—The presumption of innocence in favor of defendant continues until evidence has been introduced which satisfies the jury beyond a reasonable doubt of the guilt of defendant.

15. *Same; Construction.*—Charges must be taken in connection with the oral charge, and the oral charge in connection with the written charges.

16. *Same; Given as Written.*—Requested written charges must be given or refused in the terms in which requested.

17. *Same.*—Where parts of oral charge, when unaided by other parts of the charge, were erroneous as incomplete statements of the burden and the sufficiency of proof on the issue of self-defense, but the proper qualifications were stated in the other parts of the oral charge, and in the written charges, no reversible error intervened, although the rule is different as to written charges which may not be qualified or modified, but may be explained by the oral charge.

18. *Criminal Law; Pleading; Special Plea.*—Except as to insanity and some other phases, justification or excuse need not be pleaded in criminal cases, but are open to proof under the general issue.

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19. *Same; Elements in General; Presumption and Burden of Proof.*—In criminal trials, the state must show beyond a reasonable doubt the offense charged, and if the proof fails to establish any of the elements necessary to constitute the crime for which a defendant is on trial, such defendant is entitled to an acquittal; the burden of proving a crime and lack of justification or excuse remains at all stages upon the prosecution except where justification or excuse is especially pleaded.

APPEAL from Marion Circuit Court.

Heard before Hon. C. P. ALMON.

Bart Roberson was convicted of homicide and he appeals. Affirmed.

For former appeals in this case see *Roberson v. State*, 175 Ala. 15, 57 South. 829; s. c. 5 Ala. App. 45, 59 South. 321.

E. B. & K. V. FITE, and A. H. CARMICHAEL, for appellant. The court erred in not summoning a special venire, and in not serving a copy on the defendant.—*McSwean v. State*, 57 South. 732; *Jackson v. State*, 55 South. 118; *Haisten v. State*, 59 South. 361; *Kirby v. State*, 59 South. 374. The fact that defendant filed a plea of former acquittal of murder in the first degree and that this plea was confessed by the state, does not relieve the necessity for a special venire as the indictment still charged murder in the first degree.—Sec. 7264, Code 1907; sec. 32, Acts 1909, p. 305. The court erred in admitting the words used by defendant in what is alleged to have been his endeavor to get a son of deceased to kill deceased. Counsel discuss the errors relevant to the character of the wounds, but without citation of authority. The court erred in its charge as to the burden of proof and the doctrine of retreat.—*Allen v. State*, 148 Ala. 588; *Poe v. State*, 155 Ala. 31.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

[Roberson v. The State.]

MAYFIELD, J.—The defendant was indicted for murder in the first degree. He was convicted on a former trial of murder in the second degree only, and that judgment was reversed by this court on former appeal to this court.

Conviction of a lesser degree of crime than that charged in the indictment, under our law, is an acquittal of the charge of the higher degree of the same offense, though the judgment of conviction of the lesser offense be reversed on appeal.

However, for the defense to be availing on another trial, the defendant must specially plead it; and, unless he does plead it, he is held to have waived his right thereto. The record in this case affirmatively shows that the defendant did plainly plead former acquittal as to murder in the first degree, that his plea was sustained, and that he was put on trial for murder in the second degree only.

It is insisted that the judgment in this case should be reversed because that the record fails to show that the case was specially set for trial, and a special venire ordered, as is required for the trial of capital cases, and because it fails to show a waiver thereof as is authorized by statute in certain cases.—Code, § 7264. We cannot agree with counsel in this contention. The record does affirmatively show that the defendant was put upon trial by the jury which the law, constitutional and statutory, had provided for the trial of this case, and that if he had been put upon trial by a special or different jury, it would not have been the one provided by law. This being true, the judgment ought not to be reversed, and will not be reversed, for the failure to make a different order. A different order, if made, would have been improper.

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The judgment entry is in part as follows: "Comes E. B. Almon, solicitor pro tem., who prosecutes for the state, comes the defendant in open court in his own proper person and by attorney, and the defendant, being arraigned by having the indictment read to him, for answer thereto, pleads former acquittal of murder in the first degree, and his said plea of former acquittal to murder in the first degree, is sustained by the court, and the defendant is put on trial for murder in the second degree, and he pleads not guilty."

Rule 30 of the circuit and inferior courts provides as follows: "A former acquittal or conviction shall be specially pleaded. And in capital cases, in which, on any former trial, a verdict of conviction has been rendered for any grade of the offense charged less than the highest, when the court calls the case for the purpose of making the usual order fixing the day for trial, the defendant shall be required by the court to announce his election to file or to waive his plea of former acquittal; and if the record of the former trial sustains such plea, its truth may be confessed by the solicitor, of which facts the court shall enter a memorandum on its dockets; and in such case, the truth of the plea being admitted, no order shall be made for a special venire for the trial of the case."—Code 1907, vol. 2, p. 1525. This was a substantial compliance with this rule, and hence no special venire was required, or was even proper, after this special plea was sustained. This rule, of course, was not intended to deprive, and could not and does not deprive, the accused of his constitutional and statutory rights; it rather tends to secure and enforce them.

There was no error in that part of the court's oral charge to the jury to the effect that mercy and sentiment did not rest with them. It could have been omit-

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ted, but we cannot say that it was either improper or erroneous.

It was perfectly proper for the state to prove by the witness Dixie Vickery that defendant had encouraged witness to kill the deceased, who was the father of the witness. The question was leading, but allowing it to be so was not reversible error. This evidence offered was the best obtainable to prove the fact that the defendant had encouraged the son of the deceased to kill his father. Its credibility was for the jury, and the court could not exclude it because unnatural or unreasonable.

It was proper for the court to allow Dr. Johnston to testify by giving his opinion as to whether or not the inner lining of the skull could be fractured without fracturing the outer lining thereof. This was a subject for expert testimony, and the physician's opinion was not irrelevant. The witness was shown to have been a practicing physician for 24 years, and to be otherwise qualified to testify. The credibility of such testimony was of course for the jury, and there was no attempt on the part of the court to take that question from them.

It was competent and relevant evidence, on the trial, to show that deceased was a witness against defendant, that the case was still pending, and that defendant knew these facts, at the time he killed deceased.

It was likewise competent for the state to prove such facts by the defendant; he having voluntarily testified in the case as a witness. Certainly defendant's knowledge of the facts could not be better proven than by his own testimony.

Nor was it error for the court to state to the jury, while instructing them as to the law of the case, that the defendant had testified as to these facts.

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A number of exceptions were reserved to separate parts of the oral charge of the court. Some of the challenged portions, standing alone, are incomplete, and, abstractly considered, would be erroneous; some of them misplace the burden of proof as to certain elements of self-defense, and some exact too high a degree of proof.

There has been great contrariety of opinion among English and American courts and judges as to the burden and the sufficiency of proof, in criminal trials, on the questions of alibi, insanity, and self-defense, and this court has shared in the contrariety; but these questions have at last been set at rest in this state, by a statute on the subject of insanity, and by decisions of this court on the subjects of alibi and self-defense.

In criminal trials, including those involving homicide, it is now settled in this state that the prosecution is required to prove beyond a reasonable doubt the offense charged, and that if the proof fails to establish any of the essential elements necessary to constitute the crime for which the accused is on trial, he is entitled to an acquittal. This is said to result from the fact that the presumption of innocence, in favor of the defendant, stands until it is overcome by proof of guilt, and from the nature and form of the issue in criminal trials. As to the trial on the merits, it is usually a general denial of the crime charged, and this imposes on the prosecution the burden of proving affirmatively the existence of every material fact or ingredient which the law requires in order to constitute the offense. If the act charged in the indictment is one which is justifiable or excusable, a criminal act has not been committed if the facts show justification or excuse; and the jury may acquit if they entertain a reasonable doubt as to whether the act shown constituted a crime. In civil cases justi-

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fication or excuse, as a rule, must be specially pleaded, but in criminal cases the rule is the other way (except as to insanity and, maybe, some other phases); and such matters are open under the general issue, and the affirmative proof of the crime, in such cases, when not specially pleaded, remains in all stages upon the prosecution, and if upon the whole evidence the jury entertain a reasonable doubt as to the guilt of the accused, he is entitled to an acquittal.

For example: In order for a homicide to be murder, it must have been committed with malice aforethought. Malice is therefore just as essential an ingredient of the offense of murder as the act which causes the death; without its concurrence there is no murder, whatever other offense it may be, and as every man is presumed to be innocent until his guilt is proven, this presumption includes freedom from malice, as well as innocence of the act causing the death, and the burden of overcoming each element of the presumption rests upon the prosecution. Of course there are certain kinds and modes of homicide from which, when proven, the law presumes malice. Proof of a homicide alone does not necessarily establish that he who causes the death is guilty of murder. The killing may be either murder, manslaughter, or excusable or justifiable homicide; and if the last, the slayer would be entirely innocent.

The following will show the two views entertained by the judges on this question, and how and when this court settled our doctrine:

Sir Michael Foster, an eminent judge of the highest English court of criminal jurisdiction, and a very exact writer, whose work has been a standard authority for a century and a half, of whom Sir William Blackstone said, "He is a very great master of the common law."

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and of whom Lord Chief Justice De Grey said, "He may be truly called the Magna Charta of Liberty of persons as well as fortunes" (3 Wills, 203), states the rule thus in his Crown Law, 255: "In every charge of murder, the *fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same ground that every other defendant doth; the matters tending to justify, excuse, or alleviate, must appear in evidence, *before he can avail himself of them.*"

Chief Justice Shaw followed the views of Foster, quoting him at length, and added the following: "The argument against this proposition is this, that as it is a maxim of the criminal law, in favor of life, of innocence, and of immunity from punishment, that the guilt of the accused must be proved to the full satisfaction of a jury, and that if they have reasonable doubts on the subject, the defendant ought to be acquitted, then if the proof of the fact of extenuation is such as to raise a reasonable doubt whether there was not such sudden quarrel as to extenuate the homicide, the jury ought to find a verdict for the lesser offense; otherwise the defendant might be convicted of the higher offense, whilst in fact the jury would have doubts whether he was guilty of it. This is putting the objection strongly, and it is certainly entitled to a respectful consideration. But we think it is not well founded."—*Commonwealth v. York*, 9 Metc. (Mass.) 116, 43 Am. Dec. 373. "I have thus endeavored to establish the proposition, and it seems to be most abundantly proved, that when the fact of volun-

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tary homicide is shown, and this is not accompanied with any fact of excuse or extenuation, malice is inferred from the act; that this is a fact which may be controlled by proof, but the proof of it lies on the defendant, and if not so proved, it cannot be taken into judicial consideration. This is expressed in a variety of forms, a variety so great as to preclude the supposition that it depends upon a form of words or mode of expression transmitted by one writer or jurist to another."—*Commonwealth v. York*, 9 Metc. (Mass.) 121, 43 Am. Dec. 373. In the same case Justice Wilde said: "I regret exceedingly that the court have not been able unanimously to concur in opinion, on the important question raised by the motion of the prisoner's counsel. In the administration of justice, it is of great importance that the law and the rules of evidence should not only be founded upon just and reasonable principles, but that they also should be clearly settled. Any uncertainty of the law is a great evil, and may be productive of great injustice. This is true in all cases, civil or criminal, but more especially in capital cases, when the life of a fellow-being may depend on a principle of law or a rule of evidence."—*Commonwealth v. York*, 9 Metc. (Mass.) 125, 43 Am. Dec. 373. He then quotes and states the true rule, as he conceives it, in such cases, as follows: "When the proof on both sides applies to one and the same issue or proposition of fact, the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition, which avoids the effect of it, there the

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burden of proof shifts, and rests upon the party proposing to show the latter fact.”—*Powers v. Russell*, 13 Pick. (Mass.) 76, 77; *Commonwealth v. York*, 9 Metc. (Mass.) 127, 43 Am. Dec. 373. “Various other authorities might be cited in support of the rule laid down, * * * but it is unnecessary. I consider the rule of law as clearly settled; and it is founded on the plainest principle of reason and justice. Most certainly, when a party is charged with the commission of any crime, all the facts constituting the crime must be proved against him; and if, on the whole evidence, the jury have a reasonable doubt as to any one of such facts, they are bound to acquit him. The jury are sworn to give a true verdict according to the evidence, and not according to the presumption of any fact, unless it is a natural and reasonable inference from some other facts proved.”—*Commonwealth v. York*, 9 Metc. (Mass.) 128, 43 Am. Dec. 373.

The Supreme Court of the United States, after reviewing many authorities, English and American, as to the burden and the sufficiency of proof, on questions of insanity, self-defense, and alibi in criminal cases, and as to the effect of the presumptions of innocence, and of malice from a voluntary killing with a deadly weapon, concluded as follows: “We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict, where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is a reasonable doubt whether he was capable in law of committing crime.”—*Davis v. United States*, 160 U. S. 484, 16 Sup. Ct. 357,

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40 L. Ed. 49. "The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof, created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." "Reasonable doubt," it was also said, was "the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them."—*Coffin v. United States*, 156 U. S. 432, 459, 460, 15 Sup. Ct. 394, 404 (39 L. Ed. 481). "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."—*Davis v. United States*, 160 U. S. 487, 16 Sup. Ct. 358, 40 L. Ed. 499.

This court, in *Henson's Case*, 112 Ala. 41, 21 South. 79, after reviewing the conflicting authorities on the

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subject, adopted and followed that of the United States Court, and concluded as follows: "The jury must be convinced beyond a reasonable doubt of the defendant's guilt, and it cannot be said that in either case the defendant is required to do more than to create a reasonable doubt in the minds of the jury. The rule is generally stated as follows: 'If the jury have a reasonable doubt, generated by all the evidence in the cause, as to whether defendant acted in self-defense or not, then they should acquit' (*Smith v. State*, 68 Ala. 424, 430); or as stated in *Hurd v. State*, 94 Ala. 100 [10 South. 528], 'If the jury, upon considering all of the testimony, have a reasonable doubt of the defendant's guilt arising out of any part of the evidence, they should find him not guilty.' Under these just principles, no greater burden rests upon a defendant, when tried for a criminal offense, than to create a reasonable doubt in the minds of the jury of his guilt, and he is entitled to its benefit under the defense of self-defense, or any other grounds of defense. It traverses the averment of the charge. It was under the influence of these just principles that the law in regard to the defense of an alibi was modified, and the true rule declared to be 'that evidence adduced to support an alibi should be weighed and considered by the jury with the other evidence in the case, as other facts are weighed; and if, upon the whole evidence, there is a reasonable doubt of the defendant's guilt, he should be acquitted.'—*Pate's Case*, 94 Ala. 18 [10 South. 665]. See, also, *Albritton v. State*, 94 Ala. 76 [10 South. 426]: * * * We are aware of the fact that by the act of the Legislature (Acts 1888-89, p. 742) the burden is cast upon the accused 'of proving that he is irresponsible,' and 'shall be clearly proved to the reasonable satisfaction of the jury.'—*Maxwell v. State*, 89 Ala. 150 [7 South. 824].

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Is the principle sound which makes the right of the accused to an acquittal depend upon the order in which the evidence is introduced, rather than its credibility and weight? There is no such legislation affecting the rule of self-defense, and we feel constrained, both upon principle and authority, to the conclusion that there is no greater burden upon the accused to establish self-defense, by affirmative evidence, than any other defense, but if 'all the evidence raises in the minds of the jury a reasonable doubt as to whether he acted in self-defense, the defendant should be acquitted.'

Chief Justice Cooley, in *Garbutts Case*, 17 Mich. 9-28, 97 Am. Dec. 162, after reviewing the conflicting cases on the subject and attempting to reconcile them, said: "There is no such thing in the law as a separation of the ingredients of the offense, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent. It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent on the part of the defendant, or enter upon the question of sanity before the defendant had controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence."—17 Mich 22, 97 Am. Dec. 162. "When any evidence is given which tends to overthrow that pre-

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sumption, the jury are to examine, weigh, and pass upon it with the understanding that, although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt. Upon this point the case of *People v. McCann*, 16 N. Y. 58 [69 Am. Dec. 642], is clear and satisfactory, and the cases of *Commonwealth v. Kimball*, 24 Pick. (Mass.) 373, *Commonwealth v. Dana*, 2 Mets. (Mass.) 340, *State v. Marler*, 2 Ala. 43 [36 Am. Dec. 398], and *Commonwealth v. McKie*, 1 Gray (Mass.) 61 [61 Am. Dec. 410], may be referred to in further illustration of the principle."—17 Mich. 23, 97 Am. Dec. 162.

We do not by any means adopt all that is said in the authorities quoted from other courts as to the burden of proof of self-defense in homicide cases, nor do we mean to assert that the burden of proof as to no element of self-defense is ever on the accused. The law, we think, is well settled in this state on that subject, and we do not intend to depart therefrom.

The following authorities settle the rule in this state, and there is no intention to depart therefrom :

"When the defendant has established a present pressing necessity on his part to take life, which involves disproof of an opportunity to retreat safely, the onus is on the prosecution to show that he was at fault in provoking or bringing on the difficulty.—*Gibson v. State*, 89 Ala. 121 [8 South. 98, 18 Am. St. Rep. 96]. The burden of proof is on accused to show necessity, real or apparent, to take life, unless the evidence which proves the homicide also shows the excuse or justification.—*Linehan's Case*, 113 Ala. 70 [21 South. 497]; *Miller v. State*, 107 Ala. 41 [19 South. 37]; *Naugher's Case*, 105 Ala. 26 [17 South. 24]; *Holmes' Case*, 100 Ala. 80 [14

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South 864]; *Compton's Case*, 110 Ala. 24 [20 South. 119]; and see *Henson's Case*, 112 Ala. 41 [21 South. 79]; and *Whitten's Case*, 115 Ala. 72 [22 South. 483]. Strictly speaking, the burden of proof is never on the defendant to establish his innocence, or to disprove the facts necessary to establish the crime of which he is charged; in all criminal cases, if the evidence, any or all of it, after considering all, raises in the mind of the jury a reasonable doubt as to his guilt, he should be acquitted.—*Henson's Case*, 112 Ala. 41 [21 South. 79]; *Whitten's Case*, 115 Ala. 72 [22 South. 483]; and see *Howard's Case*, 110 Ala. 92 [20 South. 365].” Mayf. Dig. 810.

While the case of *Henson v. State*, 112 Ala. 41, 21 South. 79, was overruled in *McGhee's Case*, 178 Ala. 4, 59 South. 573, as to the correctness of a certain charge held proper in the former case, the general doctrine as to the burden of proof in self-defense was expressly affirmed. It was said in that case: “While it is incumbent upon the defendant to establish his plea of self-defense, he meets the legal requirements if the evidence creates a reasonable doubt as to whether or not he acted in self-defense, and he does not have to satisfy the jury beyond a reasonable doubt that he acted in self-defense. If, therefore, there is a reasonable doubt, from all the evidence, as to the defendant's guilt, whether arising from self-defense or any other material fact in the case, the defendant is entitled to an acquittal.—*Henson v. State*, 112 Ala. 41 [21 South. 79]; *Ragsdale v. State*, 134 Ala. 24, 32 South. 674. There was no error, however, in refusing charges 3 and F, requested by the defendant. They seek an acquittal upon a reasonable doubt as to self-defense, and fail to set out the constituents of self-defense, thus in effect referring a question of law to the jury.—*Stockdale v. State*, 165 Ala. 12, 51

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South. 563; *Smith v. State*, 130 Ala. 95, 30 South. 432; *Miller v. State*, 107 Ala. 40, 19 South. 37; *Morris v. State*, 146 Ala. 101, 41 South. 274; *Mann v. State*, 134 Ala. 1, 32 South. 704. It is true the court reversed the case of *Henson v. State*, 112 Ala. 41, 21 South. 79, for the refusal of charge 2, which is similar to the charges now considered, but this holding is contrary to the cases *supra*; and, while we do not wish to disturb the legal principles as declared in the *Henson Case*, *supra*, we do expressly overrule same, in so far as it holds that the refusal of charge 2 was reversible error."—*McGhee v. State*, 178 Ala. 4, 59 South. 576. This case has been approved and followed by most of the American courts, including the Supreme Court of the United States and this court.

Some parts of the oral charge as to which exceptions were reserved, if considered as standing alone, unaided by that which preceded and that which followed, would be error, to reverse, under the rule as we have above declared it; but, taken in connection with that which preceded, and that which followed, and in connection with the written charges, as we must take them, it affirmatively appears that no injury could have resulted. The errors, if such they should be called, consisted of incomplete statements as to the burden and the sufficiency of proof, as to the question of self-defense. Such statements were not positively erroneous, but were incomplete in that certain qualifications of the rule were not stated; but the proper qualifications were stated in other parts of the oral charge and in requested written charges, and this fact prevented reversible error.

It does affirmatively appear from this record that the law was fully and fairly stated by the court to the jury (in some instances more favorably to defendant than he had a right to demand); and this is all that the law

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guarantees, and all that the accused has a right to expect. We do not mean to say by this that a trial court can avoid reversal by charging the law in two or more ways, one right and the other wrong, for in such case the jury would not know which instruction to follow; but when, as in this case, there may be certain statements of the law in the oral charge, which, standing alone, are incomplete or need qualification or explanation, and these qualifications or explanations are contained in other parts of the oral charge or in written requested charges, then there is no reversible error as to such parts of the oral charge excepted to, because they did receive the corrections which the law requires. The rule, however, is different as to written or requested charges; they must be given or refused as requested; they may be explained by the oral charge, but not qualified or modified.

There is found no reversible error in refusing any one of the written charges requested by the defendant. Each was either incorrect as a statement of the law, misleading, or argumentative, or else, being correct, found a substantial (and in some instances, a literal) duplicate in the charges given at the request of the defendant. In evidence of this, we find that it is not contended for the accused, though represented here by very able counsel, that there was any error as to the refused charges.

Finding no reversible error, after searching the record therefor as by the statute we are required to do, the judgment of conviction and the sentence must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

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Pope v. The State.*Murder.*

(Decided June 30, 1913. 63 South. 71.)

1. *Evidence; At Former Trial; Absent Witness.*—Inability to find a witness and produce him at the trial is a sufficient predicate for the admission of his testimony given at a former trial, although it is not affirmatively shown that he is dead, insane or out of the jurisdiction of the court.

2. *Same.*—The predicate examined and held sufficient to show that a witness could not be found by the exercise of due diligence and hence, sufficient as a predicate for the introduction of his evidence, given on a former trial.

3. *Same.*—Where there is no evidence that the witness ever resided or remained in any other county than that of the county of the trial, and that a subpoena to any other county would procure his attendance, due diligence does not require the issuance of subpoenas to other counties.

(McClellan and Somerville, JJ., dissent.)

APPEAL from Anniston City Court.**Heard before Hon. THOMAS W. COLEMAN, JR.**

Erwin Pope was convicted of murder in the first degree, sentenced to be hanged and he appeals. Reversed and remanded.

THOMAS J. HARRIS, for appellant. No brief reached the Reporter.

R. C. BRICKELL, Attorney General, and **W. L. MARTIN**, Assistant Attorney General, for the State.

SAYRE, J.—The law of this case on all questions, of any consequence, with one exception which will be specially noticed, has been thoroughly threshed out on former appeals, and settled to our satisfaction.—*Pope v. State*, 174 Ala. 63, 57 South. 245; *Id.*, 168 Ala. 33,

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53 South. 292. On the last trial the court below followed the previous rulings of this court, and this appeal does not require that anything more be said as to them.

At the trial now under review the defendant "offered to prove by T. C. Sensabaugh the testimony of John Body sworn to at the first trial of this case, the testimony offered being as follows," and here follows in the bill of exceptions a statement of the proposed testimony. The objection interposed to this testimony of the absent witness by the state's solicitor was that "it was not properly predicated, that it was not shown that Body was dead or had removed from the state." The court sustained this objection, and the defendant duly excepted.

It must be conceded that evidence of what a witness has sworn on a former trial, where there was opportunity for cross-examination, should be received, when it appears that the personal attendance of the witness is unobtainable, though it cannot be shown affirmatively that the absent witness is either dead, insane, or beyond the jurisdiction of the court. If, for example, it be shown that the whereabouts of the witness is unknown after diligent search, the reason of the rule for this exceptional sort of evidence, which is to avoid a failure of justice (*Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95) obtains and holds good in such a case. There are precedents to the contrary in some other states; but the better and more general opinion is that inability to find a witness is a sufficient reason for his nonproduction.—1 Greenl. Ev. (16th Ed.) § 163g, p. 284. This court in a number of cases has expressed its favor to the admissibility of secondary evidence in such circumstances, and it may now be said to be well settled in this state.—*Lowe v. State*, 86 Ala. 52, 5 South. 435; *Thompson v. State*, 106 Ala. 74, 17 South. 512; *Burton v. State*, 107

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Ala. 68, 18 South. 240; *Mitchell v. State*, 114 Ala. 1, 22 South. 71; *Burton v. State*, 115 Ala. 1, 22 South. 585; *Lett v. State*, 124 Ala. 64, 27 South. 256; *Percy v. State*, 125 Ala. 52, 27 South. 844. But, testimony of this character being admitted from necessity and by way of exception to the general rule of the law, the party offering it assumes the burden of showing to the court that he has exercised due diligence to find the witness.

The objection taken in the court below called attention to one defect only in the predicate laid, to wit: That the proof of Body's death or absence from the state was insufficient, whereas defendant's effort was to show that the witness could not be found, whether dead or alive, whether within or without the state. The question whether the witness could not be found after due diligence was preliminary to the introduction of the proposed testimony, and in the court below was addressed to the judgment of the presiding judge. Here the question is whether, after making proper allowance for the finding below, it sufficiently appears that the whereabouts of Body was unknown, and his testimony at first hand unobtainable by due diligence. If so, he was dead for the purposes of evidence, and secondary proof of his testimony should have been received.

The case presented to the trial court was as follows: It appeared that the absent witness, Body, had lived in Calhoun county for nine or ten years at least. McClurkin was killed in the road immediately in front of the house where the witness lived. There were circumstances which pointed right strongly to his participation in the crime. The defendant had contended all along that Body alone was the guilty agent, and when this case was last here we said on rehearing and after great deliberation: "We have reconsidered the whole evidence with a special view to its tendencies with re-

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spect to the possible responsibility of Body for the crime charged against defendant, and, in the light of this examination, we are now all of the opinion that the composite effect of all the circumstances shown in evidence might have led the jury, by deductions not strained nor irrational, to impute the commission of the crime to Body." Subpœnas for Body had been issued at various times, and had been returned "not found." It is a fair presumption that these subpœnas had been issued for service by the sheriff of Calhoun county alone. And, for aught appearing, they may have issued at the instance of the state—probably did, for while the testimony which defendant offered to reproduce was of such character as to create the impression that Body knew more of the crime than he was telling, and while at one point at least it tended to break the chain of circumstances which the state had woven about defendant, yet Body's testimony, if worthy of belief, may on the whole have weighed heavily against the defendant, and the indications of the record are that on the first trial he was used as a witness for the state. However these things may be, the credibility and effect of the proposed testimony was a matter to be determined by the jury alone. As affecting its competency, we observe that there was no evidence going to show that the witness had ever resided, stopped, or had occasion to stop, in any other county; none to show a likelihood of his presence in any other county at the time of the trial or just prior thereto; none to show a probability that subpœnas to other counties would have been of any avail, and hence no duty of diligence resting on defendant to procure the issuance of writs to other counties.—*Jacobi v. State*, 133 Ala. 1, 32 South. 158.

In connection with the case thus shown it must be considered that witnesses brought by the prosecution

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testified as follows: G. A. Braswell: "I have not seen John Body since he was here in court at the first trial of this case. He had started a crop there on my place. After the killing he did not do any more work on the crop. He left, and I have not seen nor heard from him since." Joe Dodgen, a blacksmith: "I have not seen John Body about Oxford since the first trial of this case—except just after the first trial. The first trial was nearly four years ago. I have not seen him since that time. I used to do his work. I have not done any work for him in four years." J. L. Murphy: "Body was here until the first trial. He was kept in jail until the trial. I have not seen him since then. It must be a fact that he has left." Nett Body: "I am the mother of John Body. John is not in this state now as I knows of. I have not seen John nor heard from him since that first year. I have not had any letters from him in the last year or two. I do not know where he is now. John was arrested the morning the body was found. They kept him in jail until after the first trial. He stayed at home just a few days after he was turned out. I had one letter from him after he left here. I do not know where that letter was writen from." Dan Hall, a near neighbor: "I do not know where Body is now."

Upon consideration of the case thus shown we are clear to the conclusion that the witness John Body had gone to parts unknown; that no degree of diligence which might in reason have been required of defendant or his counsel would have availed to discover the whereabouts of the witness; that he had gone permanently, or his return was highly improbable; and that in consequence, under the rule heretofore declared by this court for the governance of such cases, the evidence of what the absent witness swore at the first trial should have been received.

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For the error shown in rejecting this testimony the judgment must be reversed, and the cause remanded for another trial, pending which the defendant will be held.

Reversed and remanded. All the Justices concur, except McCLELLAN and SOMERVILLE, JJ., dissenting.

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Murder.

(Decided June 30, 1913. 63 South. 8.)

1. *Evidence; Flight.*—In a criminal prosecution the state may always show flight of defendant, such as by showing that he absented himself from the community of the crime, as tending to show his sense of guilt, fear of arrest, or to avoid arrest.

2. *Same; Attending Circumstances.*—Where the state has offered evidence showing flight of defendant, either the state or defendant may show the circumstances attending it as shedding light on defendant's motive in leaving the community.

3. *Same.*—While a defendant cannot introduce self-serving declarations as to his connection with the crime for the purpose of showing his motive in leaving the community, he may show his act and words which are so connected with the flight as to give character to it.

4. *Same.*—Where the state has shown the flight of defendant, and facts and circumstances tending to show that he was trying to conceal his movements, it was competent for defendant to introduce the contents of two post cards written by him to his mother in which he stated where he was going and what he intended to do, although the cards were admitted for the purpose merely of showing that he had written to his mother.

5. *Witnesses; Impeachment.*—A letter written after the commission of the crime by a detective who arrested the defendant, to another witness in the case in which he stated that it was time for such witness to get busy, asked her if she knew anything of value, and told her to keep him posted, was admissible as tending to show the interest of the witness and the detective.

(McClellan, J., dissents.)

APPEAL from Gadsden City Court.

Heard before Hon. J. A. BILBRO.

Wiley Goforth was convicted of murder, and he appeals. Reversed and remanded.

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The letter referred to in the opinion was dated Birmingham, Ala., August 22, 1911, addressed to Mrs. Zella Cohelia, Altoona, Ala. Dear Friend: I am somewhat surprised at not seeing or hearing from you. I think it is time for you to get busy. You know I have told you how to do. What do you know, anything of value? Listen, keep me posted about everything, and when you are in Birmingham, be sure and come around and see me. I might be able to tell you something. Mr. Judge told me he had one letter from you and you had been sick. Let me hear from you real soon. Your very respectfully, Irby Zeigler." The bill of exceptions states that the letter was offered by the defendant as the letter testified to by the witness Zeigler as the letter he wrote to Zella Cohelia. It seems that Zeigler was a detective, and was present when witness Cohelia made a statement to the solicitor concerning the crime; also that Zeigler went to Arkansas, arrested the parties, and brought them back, and that he wrote the above letter after the killing.

CULLI & MARTIN, for appellant. Upon the question of interest or bias of the detective, the court erred in excluding the letter written by the detective to the witness Zella Cohelia.—*Ott v. State*, 160 Ala. 32; *Cross' Case*, 147 Ala. 130; *Martin v. State*, 104 Ala. 71; Jones on Evid. sec. 826. The state had introduced evidence tending to show flight of defendant, and defendant was entitled to any facts and circumstances connected therewith for the purpose of explaining his absence, and the postal cards written by him to his mother were admissible in evidence.—*Sylvester v. State*, 71 Ala. 18; *Carden v. State*, 84 Ala. 420; *Elmore v. State*, 98 Ala. 12; *White v. State*, 111 Ala. 97. Counsel discuss other matters connected with the trial that are not discussed

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in the opinion, and it is therefore not deemed necessary to here set them out.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The conduct of defendant on or about the time of the homicide may be properly introduced in evidence.—*Raines v. State*, 88 Ala. 91; *Perry v. State*, 91 Ala. 83. Evidence of flight and the attendant circumstances is always admissible in a criminal case, and the court was not in error in any of its rulings thereon.—*Allen v. State*, 146 Ala. 61, and authorities cited in appellant's brief. Testimony that others were arrested for the crime was not admissible.—*Walker v. State*, 153 Ala. 31; *McDonald v. State*, 165 Ala. 85; *McGehee v. State*, 171 Ala. 19.

DE GRAFFENRIED, J.—In a criminal prosecution the state may always offer the *flight* of the defendant from the neighborhood of the crime as *some evidence*—a *circumstance*—tending to show the guilt of the defendant.

When a crime has been committed, and the state offers evidence tending to show that the defendant *absented* himself from the community in which the crime was committed, the *value* of this *fact of flight* depends entirely upon the *purpose* of the defendant in thus absenting himself from the community. The question as to *why* the defendant *left* the community and remained away from it becomes a question for the jury, and so, when the *state* offers the *fact* of the defendant's flight from the community in evidence, the law allows *both* the *state* and the *defendant* to show all those things which the defendant said and did *when he left*, and *while away* from the community, which tend to explain the *quo animo* of the *flight*, whether the absence of the

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defendant was due to his *sense of guilt*, or his desire to *avoid*, or *through fear of*, arrest, or on the other hand, whether his absence was due to other causes.

The evidence which the defendant may offer on this subject cannot be offered or received as self-serving declarations tending to show that he had no connection with the commission of the corpus delicti. The evidence which he may lawfully offer on this subject is evidence *connected with his flight*, and explaining the character of the flight. In other words, when the state, in a criminal case, offers evidence tending to show flight on the part of the defendant, then the *acts and words* of the defendant which are so connected with the flight *as to give character to it*, and to really give color to it, are *parts* of the res gestæ of the flight, and are admissible as such. Flight, as used in this connection, means that the defendant absented himself from the community of the crime out of a sense of guilt, out of fear of or to avoid arrest, and any word or act of the defendant while in flight—i. e., *while away from the community of the crime*—tending to *explain the reason* for his absence is admissible as a part of it. Of course a defendant, in such a case, cannot get before a court or jury his declaration that he is not guilty of the crime, or any other mere self-serving declaration tending to show that he had no connection with the commission of the corpus delicti, but he may show, as evidence tending to rebut the idea that his absence was in fact a “fleeing from justice,” such acts and declarations of his while absent which may tend to show that his absence from the community was due to an entirely different cause. In other words, when flight is offered as a circumstance tending to show the defendant's guilt, the question is *at once at hand* as to whether, *during his absence*, the defendant is to be regarded as having been

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a *fugitive from justice*, or whether he is to be regarded as having been absent for an innocent and lawful purpose disassociated with any idea of the crime. In this connection the manner in which the defendant left the community—whether openly or secretly, whether in a usual or in an unusual manner, and whether at a usual or an unusual time—are all matters which may go before the jury as tending to illustrate the character of the flight. The manner in which the defendant traveled while en route to the point of his destination, whether openly or secretly, and whether in a usual or in an unusual way, are also matters for the consideration of the jury. The point to which the defendant went and the general character of his conduct while there before his arrest, whether usual or unusual, are also matters for the consideration of the jury.

A criminal may, of course, leave a community in an open and in an accustomed way; he may, while on his journey, conduct himself in the usual and accustomed way, and when he reaches the point of his destination he may remain in the open, do nothing to conceal his identity, conduct himself in the usual way, and openly keep those informed at the place of the crime of his whereabouts. But a *fugitive from justice does not usually behave in this manner* because such behavior usually defeats the object of the criminal in becoming a *fugitive from justice*. The criminal usually leaves a community secretly, conceals his identity while en route, and by changing his *name*, etc., conceals his identity when he reaches his destination, etc. It is for these indicated reasons that the law, *on the question as to whether a particular person was, at a particular period, a fugitive from justice*, permits the broad range to the testimony to which we have above alluded.

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The general facts in the instant case strongly illustrate the proposition under discussion. Altoona is a small mining town. The defendant, who was, at the time to which we refer, 17 years of age, resided there with his parents. There was evidence tending to show that the defendant was a miner, and that, as the work in the mine at the named point was becoming nonremunerative, he and an adult acquaintance, Joe Salsbury, had, for some time, contemplated going to Spadra, Ark., where there was a mine, and where they could find remunerative work. The evidence shows that on the *night* of July 2, 1911, a man by the name of Nicholas Shintzen was murdered in Altoona, and the defendant and Joe Salsbury were indicted for the murder. There was a trial in which there was evidence tending to show that the defendant and said Joe Salsbury were guilty of the murder, and there was evidence tending to show that they were not guilty. For the purpose of *aiding* its evidence tending to show the defendant's guilt, the state was properly permitted to prove that at an early hour on the morning after the murder the defendant and said Joe Salsbury left Altoona; that they left on a train for Birmingham, Ala.; that they left the train at Birmingham at an *unusual* place, and *before* the train reached its *regular station* or stopping place at Birmingham; that one of said parties registered at a hotel in Birmingham under an *assumed* name, and that the other party *failed* to register at any hotel at Birmingham. The murder was committed for the purpose of robbery, and evidence was therefore properly admitted tending to show that these parties *gambled* and *spent* money in *bawdyhouses* while in Birmingham. Evidence was also properly admitted tending to show that these parties went from Birmingham, Ala., to Memphis,

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Tenn.; that they bought tickets over a railroad to a *point* only a *part* of the way to Memphis, and that, from *that* point, they *beat* their way into Memphis by riding in a *box car* on a *freight* train. Evidence was also properly admitted tending to show that these parties went from Memphis to Little Rock, Ark.; that they beat their way from a point near Memphis to Little Rock by riding on the *top* of a *sleeping car*; and evidence was also properly admitted showing that the parties went from Little Rock to *Spadra*, and the *manner in which they went*, and that they were arrested at *Spadra*. The above *unusual things* which these parties did were admissible as evidence for the purpose of showing that they were *fugitives from justice*, for the purpose of showing the *character of their flight* from Altoona and as a part of the *res gestæ* of that flight. When, however, the defendant reached Memphis, Tenn., there was evidence tending to show that he wrote and mailed to his mother at Altoona the following open postal card:

"W. G. Memphis, Tenn. [Stamp.]

Jul. 22, 10 P. M. 1911.

 Hello Mama I am in mem-
phis now I am on my way to Mrs. M. A. Goforth,
spada now. I will write again Altoona,
when I get out there Ala.
 yours kidow"

There was evidence, also, tending to show that when the defendant reached Spadra, Ark., he wrote and mailed to his mother at Altoona the following other open postal card:

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jul. 25, 1 P. M. 1911.

"Wiley Spadra,

[Stamp.]

Hello Mama how are you by
this time I am all ok say ma-
ma we landed in Spadra sun-
day evening I am going to
look for a job this morning
tell all the kids hello for me."

Mrs. M. A. Goforth,
Altoona,
Ala.

Giving the bill of exceptions an honest interpretation, we take it that the trial judge admitted the postal cards in evidence for the purpose of showing that the defendant wrote his mother when he reached Memphis, and that he wrote to her when he reached Spadra, but that he excluded from the jury the contents of the postal cards. In the opinion of the writer the trial court, in *this* ruling, committed reversible error. While the contents of the postal cards may have been intended by the defendant for his mother *only*, nevertheless they were *open*. Regardless of the question as to whether it would have been a violation by the postal authorities of the laws or regulations of the post office department to have read those postal cards or not, the postal cards were open, and the defendant *must* have known, when he mailed those postal cards, that they *could* be read by any person in the employ of the United States government or by any other person into whose hands they might fall before they reached his mother. The defendant knew that Altoona was a small town. He probably knew the postmaster, and if the state's theory is the correct theory, he not only knew of the murder, but was, when he left Alabama, when he reached Memphis, and when he arrived at Spadra, and while at Spadra, before arrest, *in flight* because of this crime—a fugitive from justice. The postal card from Memphis showed

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with sufficient certainty the defendant's identity. It showed to any one who might read it that he was the son of Mrs. M. A. Goforth of Altoona, Ala. It showed that he was in Memphis on a certain date, and that he was on the way to Spadra. It told to the postmaster or clerk in the post office at Altoona exactly what it told the mother. The same is true with reference to the postal card from Spadra. Neither postal card by any word refers to the murder, and neither card contains any self-serving declaration on that subject. The card written from Memphis has some tendency to show that the defendant was not then undertaking to conceal his whereabouts, and also contained information as to where the defendant was going. The card from Spadra also has some tendency to show that the defendant was then making no effort at concealment, and also *why* the defendant went to Spadra. On the question as to whether the defendant was a fugitive from justice the contents of the postal cards should have been admitted. They had a tendency, the weight of which was for the jury, to give *quality* to the absence of the defendant from Altoona, and also had a tendency to show, the weight of which was also for the jury, that the absence of defendant from Altoona was due to his desire for work rather than his desire to evade arrest or to place himself, if his connection with the crime was detected, in a position to avoid arrest. In other words, the act of placing those open postal cards in the mails, when construed in the light of what was written upon them, places this pertinent question before the jury, *viz.*, Is that act consistent with the theory that the defendant was then in flight because he had committed murder? In other words, would a fugitive from justice have so conducted himself? The mere fact that the defendant mailed postal cards to his mother without more can-

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not shed that same light upon the *character* of the flight of the defendant as the postal cards, when read in the light of the messages upon them, which messages *do* have a tendency to show what the defendant was doing at the time they were mailed, and what he intended in the future to do. If those postal cards had told the mother an untruth about the defendant's whereabouts, they would have been admissible on the part of the state because they would have tended to support the state's theory that the defendant was a fugitive from justice. The fact that they *openly* told the truth has a tendency, on the other hand, to support the theory of the defendant, viz., that his absence from Altoona was not traceable, in any way, to the murder with which he was charged. They had *no tendency* to show that he was *not guilty of the murder*, but they did tend to show that his theory that he did not leave Altoona because of the murder was the true theory. The state invited this character of testimony when it offered the defendant's flight as a circumstance tending to show his guilt, and, the state having opened the door, the trial court should have let the testimony in, and allowed the jury to say what weight it was entitled to when considered in connection with the subject for which it was only admissible, viz., the *quality* of the defendant's absence from Altoona. It was admissible for this purpose and for no other, but for this purpose it was relevant and material, and because of the court's refusal to admit this testimony this cause must be reversed.—*United States v. Candler* (D. C.) 65 Fed. 308; *Allen v. State*, 146 Ala. 61, 41 South. 624.

(2.) This case must again be tried, and it may be well for us to say that under some of the tendencies of the evidence in this case a majority of the members of this court are of opinion that the letter which was written

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by Irby Zeigler to Zella Cohelia, and which was dated Birmingham, Ala., August 22, 1911, is relevant, and should be admitted in evidence upon the next trial of this case, provided the evidence on the next trial is substantially similar to the evidence which was had upon the trial which has resulted in this appeal. The letter has some tendency to illustrate the interest which the witnesses Zeigler and Cohelia have in this case.

3. It is the opinion of all the members of this court that the rulings of the trial court on all matters not above discussed were in accordance with the law.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. MCCLELLAN, J., dissents.

Hays v. The State.

Murder.

(Decided June 30, 1913. 63 South. 7.)

Homicide; Evidence; Motive.—Where there was evidence that defendant had threatened to kill deceased because deceased had reported him for violating the prohibition law, the affidavit charging defendant with the violation of that law, signed by deceased, was admissible in evidence, as tending to show motive.

APPEAL from Covington Circuit Court.

Heard before Hon. H. A. PEARCE.

Tom Hays was convicted of murder and he appeals. Affirmed.

No counsel marked for appellant.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The affida-

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vit signed by deceased charging defendant with the violation of the prohibition law was admissible to show motive in view of the evidence of threats made by defendant.—*Overstreet v. State*, 46 Ala. 30; *Marler v. State*, 67 Ala. 55; *Duncan v. State*, 88 Ala. 31; *Tate v. State*, 94 Ala. 14.

MAYFIELD, J.—The defendant was indicted, convicted and sentenced to life imprisonment, for the murder of R. D. Sowell.

The record proper appears to be regular, and discloses no reversible error. The transcript shows a waiver of a special venire, made in writing and entered of record, as is authorized by section 7264 of the Code.

The bill of exceptions shows objections or exceptions to only one matter during the progress of the trial, and that was as to the introduction in evidence of an affidavit, made by deceased, charging the defendant with a violation of the prohibition laws touching the sale of intoxicating liquors. This evidence was admissible, in connection with other evidence to show motive. There was evidence showing threats made by defendant to kill the deceased, and for the reason that deceased had reported him for the violation of the law, and, according to the witness Kaufman, that defendant, speaking to the witness and referring to the deceased, had used this language: "That damned man there swore a lie against me, and I am going to kill him."

The affidavit, under the circumstances, was clearly admissible in evidence. A motive to commit a crime is to be inferred from other facts, and is not, on account of its nature, susceptible of direct proof; yet evidence which shows or tends to show facts from which the jury may infer motive is admissible in evidence.—*Fowler v. State*, 155 Ala. 21, 45 South. 913; *Ward v. State*, 153

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Ala. 9, 45 South. 221; *Nordan v. State*, 143 Ala. 13, 39 South. 406.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

Bailey v. The State.

Murder.

(Decided June 30, 1913. 63 South. 73.)

Trial; Objection to Evidence; Time.—Where the question gave notice of the anticipated answer, and defendant permitted the question to be asked and answered without objection, his motion to exclude the evidence came too late, and was properly overruled.

APPEAL from Marengo Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Viney Bailey was convicted of murder and she appeals. **Affirmed.**

No counsel marked for appellant.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

SAYRE, J.—This case was properly tried and the result must be affirmed.

The court and the jury might have found that there was a conspiracy between defendant and Joe McGay to take the life of deceased.—*Tanner v. State*, 92 Ala. 1, 9 South. 613. It was immaterial for the purposes of this case whether or not Cleveland Trimble was a party thereto.

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Without affirming anything as to the competency of the witness Allen to say whether the bones about which he testified were human bones, defendant can take nothing by her exception to his testimony on that point, because a reasonable interpretation of the bill of exceptions is that the question which elicited the answer gave notice of the anticipated answer, and, notwithstanding this, defendant waited for the answer without objection. Under these circumstances, the motion to exclude was properly overruled.

There is no merit in the other exceptions.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and DE GRAFFENRIED, JJ., concur.

Johnson v. The State.

Murder.

(Decided June 30, 1913. 63 South. 163.)

1. *Convicts; Life; Statute; Construction.*—Under section 7089, Code 1907, a person convicted of murder in the first degree and sentenced to be hanged, which sentence was commuted by the Governor to life imprisonment, is a "convict sentenced to imprisonment for life," since the commutation simply substituted a less for a greater punishment, and the judgment had the same legal effect after commutation, as if the jury had fixed his punishment at life imprisonment instead of death.

2. *Same.*—In a prosecution of a convict for murder after the introduction of a copy of the judgment sentencing defendant to death, it was proper to admit in evidence the statement of commutation of punishment to life imprisonment.

3. *Same; Failure to Record.*—The failure of the circuit clerk to record the statement of commutation, as is required by section 7518, Code 1907, did not affect its legality, validity, or admissibility in evidence.

4. *Homicide; Indictment; Charging Instrument.*—An indictment properly charging murder by means of a certain instrumentality is

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sufficient if it specifies the instrumentality by its generally accepted name; hence, an indictment charging that defendant killed deceased with a pick is sufficient, although it does not specify the particular kind of pick.

5. *Same; Evidence.*—Where the prosecution was of a convict for the murder of another convict, it was competent for a convict witness to state that as he ran by the defendant the defendant asked him where he was going, that he replied that he was going to tell the Cap'n about the killing of Josh, and that the defendant said: "If you go down and tell him, I will kill you when you come back," as it was part of the *res gestæ*, and occurred while defendant was still in the act of murder. Such statements were also admissible as illustrating the frame of mind of defendant at the time of the homicide, and as tending to show that he knew he was not acting in self-defense.

6. *Same; Opinion Evidence.*—Where the theory of the state was that deceased became overcome by powder smoke in a mine, and laid down, and upon his refusal to get up when defendant ordered him to do so, defendant killed him with a pick, it was harmless error to permit a witness to state that the smoke in the mine was powder smoke as it was immaterial what kind of smoke overcame the deceased.

7. *Same.*—In a prosecution under section 7089, Code 1907, the fact that it was necessary, in order for the state to show that defendant was a life convict, to first show that he was convicted and sentenced to death, followed by commutation to life imprisonment, could not have been prejudicial to defendant, as the fact that the sentence was commuted tended to show that the crime was attended by palliating circumstances.

8. *Evidence; Convicts; Weight.*—Although as a general rule, the testimony of convicts is not regarded as being reliable, yet such testimony will authorize and sustain a conviction for crime of the highest magnitude, although uncorroborated.

APPEAL from Bibb Circuit Court.

Heard before Hon. B. M. MILLER.

Jackson Johnson was convicted of murder in the first degree, and he appeals. Affirmed.

JEROME T. FULLER, for appellant. The indictment was demurrable for failure to sufficiently describe the instrument by which the killing was accomplished.—*Williams v. State*, 130 Ala. 31. The state is proceeding under section 7089, Code 1907, and the court was in error in admitting the judgment of conviction, and sentenced to death, and also the fact of commutation to

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life imprisonment.—*Walker v. State*, 96 Ala. 55; *Brown v. State*, 47 Ala. 47; *McMurray v. State*, 6 Ala. 342; *Gilmore v. State*, 99 Ala. 158. A material variation in the allegation and the proof is fatal to a conviction.—*Stone v. State*, 115 Ala. 121; *Lynch v. State*, 89 Ala. 20. The commutation was not effective because not recorded by the clerk as required by section 7313, Code 1907, and hence, was not admissible in evidence.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The indictment was entirely sufficient.—*Sims v. State*, 58 South. 379; *Smith v. State*, 142 Ala. 14; *King v. State*, 137 Ala. 47. The commutation of the sentence was properly filed in the office of the Secretary of State, and a certified copy thereof was competent as evidence.—Secs. 3983, 3985 and 4002, Code 1907; *State v. Wilson*, 123 Ala. 259. It was not error to show these facts by defendant himself.—*Deal v. State*, 136 Ala. 52. Under the terms of the indictment, the proper penalty was imposed.—156 N. Y. 541.

DE GRAFFENRIED, J.—The defendant, Jack Johnson, was on March 2, 1910, convicted in the circuit court of Bibb county of the offense of murder in the first degree, and, as punishment for such crime, was by said court sentenced to be hanged. He appealed from that judgment to this court; but this court affirmed the judgment of the Bibb county circuit court. Thereupon, on the 12th day of February, 1911, the Governor of Alabama, to whom an appeal was made for executive clemency, commuted the defendant's sentence to life imprisonment. The effect of the commutation by the chief executive was to change the judgment of the court, and the commutation abrogated the sentence of death im-

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posed by the court, and substituted in its stead life imprisonment in the penitentiary. The judgment, after commutation, had the same identical legal effect as if the jury, by their verdict, had declared that the defendant, as punishment for said offense, should suffer imprisonment in the penitentiary for the term of his natural life, and there had followed the verdict a judgment of the court sentencing the defendant to life imprisonment in the penitentiary. While the defendant owed his life to the clemency of the Governor, his imprisonment for life in the penitentiary, after the commutation by the Governor, was referable to the judgment of guilt which was pronounced against him by the circuit court of Bibb county on March 2, 1910, and we can see no reason why the defendant is not *now* "a convict sentenced to imprisonment for life for murder in the first degree from the circuit court of Bibb county, Alabama, to wit, on March 2, 1910," as he is, in the quoted language of the indictment in this case, described to be. Commutation does not affect the judgment of conviction. It simply substitutes a less for a greater legal punishment, operating as a reaffirmation of the judgment of guilt, and may well be referred to the judgment of conviction rather than to the act of the pardoning power. In other words, this defendant is a life convict under a judgment of conviction for murder in the first degree which was pronounced upon him on the above-named day, and he may well be so designated, although, but for executive clemency, he would have been hanged.

For the above reason we are of the opinion that the court properly admitted evidence showing the commutation of the defendant's sentence to death by hanging to life imprisonment, and for the same reason we are of the opinion that there was, on the subject now under

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discussion, no material variance between the allegations of the indictment and the proof. The judgment of the Bibb county circuit court sentencing the defendant to death on March 2, 1910, taken in connection with the certified copy of the judgment of this court, rendered on July 6, 1910, affirming the said judgment of the said circuit court, and the commutation of the defendant's sentence made by the Governor of Alabama on February 12, 1911, and duly attested by the Secretary of State, sufficiently sustained the allegations of the indictment as to the conviction and sentence of the defendant to the penitentiary for life.

The mere fact that the clerk of the circuit court of Bibb county failed to record, as required by section 7513 of the Code, the statement of commutation in no way affected the validity or legality of the commutation or its admissibility as evidence, and the statement of commutation introduced by the state was not subject to any of the grounds of objection interposed to it by the defendant.

(1) It appears that the defendant, after said commutation and while at work for the state in a coal mine as a life convict, killed Josh Grimes, another convict, by striking him with a miner's pick. The evidence for the state tended to show that Josh Grimes was lying down in the mine, and that the defendant, without provocation on the part of Grimes, struck him on the side of the head, fracturing the skull and probably killing him at the first blow; that, after the defendant had struck Grimes on the head as above stated, he continued to strike him with the pick on his breast, and that Grimes was dead before the defendant ceased beating him. The evidence for the defendant tended to show that Grimes undertook to kill the defendant, and that the defendant killed Grimes in self-defense.

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(2) Section 7089 of the Code of 1907 provides that: "Any convict sentenced to imprisonment for life, who commits murder in the first degree, while such sentence remains in force against him, must, on conviction, suffer death." The defendant, for the murder of Grimes, was indicted under the said quoted section, was regularly tried, convicted, and sentenced to death, and from that judgment he appeals.

(3) The indictment charges that "the defendant * * * did unlawfully and with malice aforethought kill Josh Grimes by striking him with a pick," etc. The defendant demurred to the indictment, because it failed to allege what sort of "pick" was used by the defendant in killing the deceased. Says the defendant's counsel: "There are many kinds of picks, and, as we are aware, quite a large per cent. of picks are not considered weapons, and could not be used to advantage in committing murder." There are many kinds of knives, sticks, and stones, some of which are not considered weapons; but under the laws of this state indictments which charge murder with a "knife," "stick," or "stone," without further particularizing the instrument, are sufficient. An indictment which properly charges murder by means of a certain instrumentality is sufficient if it specifies the instrumentality by its generally accepted name.—*King v. State*, 137 Ala. 47, 34 South. 683; *Smith v. State*, 142 Ala. 14, 39 South. 329. The indictment was not subject to the defendant's demurrer.

(4) Walker Gray, a witness for the state, testified in part as follows: "Then he (meaning the defendant) reached down and got a pick and struck him (meaning deceased) right back on the head, and Josh (the deceased) laid over on his face, and Jack (the defendant) pulled him over and commenced lamming him

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on the breast with the end of the pick. I then ran by him (defendant) while he was striking Josh, or just as he struck him, and defendant said to me, 'Where are you going?' I told him I was going 'to tell Captain about you killing Josh.' " The witness was then asked by the solicitor the following question: "Tell the jury what Jack Johnson (the defendant) said right then." The witness answered: "He said, 'If you go down there and tell him, I will kill you when you come back here.' "

The defendant seasonably objected to the quoted question and the answer thereto, and the action of the trial court in permitting the question and in admitting the answer as evidence, it is claimed by the defendant, constituted error, for which the judgment in this case should be reversed. The above-quoted conversation between the defendant and the witness seems to have occurred, or at least, to have commenced, while the defendant was still in the *act* of murder. When it commenced—and the entire conversation occupied, necessarily, an exceedingly short time—the defendant was *still* striking the deceased with the pick. It was therefore, in truth, a part of the transaction itself, and its admissibility is sustained on that ground.

In addition to this, the entire situation of the parties and the conversation itself show that the statements alleged to have been made by the defendant to the witness were made *voluntarily*. The quoted words of the defendant certainly have some tendency to illustrate the *frame* of mind of the defendant at the time of the homicide, and they tend to show that the defendant then knew that he was not acting in self-defense, but that, in killing the deceased, he knew that he was doing a wrong, and they were also for that purpose admissible.—*Pate v. State*, 150 Ala. 10, 43 South. 343; *Fleming v. State*, 150 Ala. 19, 43 South. 219; *Young v. State*, 149

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Ala. 16, 43 South. 100; *Williams v. State*, 147 Ala. 10, 41 South. 992; *King v. State*, 40 Ala. 314.

(5) We are also of the opinion that the court committed no error in allowing a witness to say, in answer to the question of the solicitor, "What kind of smoke was that?" that the smoke was powder smoke. The state claims that in discharging some powder in the mine smoke was thereby created; that the deceased, being at the point of the smoke, became temporarily affected thereby, and that he laid down; that the defendant ordered the deceased to get up, and upon his refusal to do so killed him with a pick. It really did not matter what sort of smoke overcame the deceased, and for that reason no injury could possibly have been done the defendant by the admission of this testimony. In fact we are inclined to think that this testimony tended to the advantage of the defendant. His testimony tended to show that the deceased was not lying down when he was killed, that the deceased was, at the time of his death, in the act of striking the defendant, and that there was not only no powder smoke in the mine at that time, viz., 9 o'clock in the morning, but that no powder was, at any time, discharged in the mine except at *night*. In other words, through this testimony the defendant was enabled to develop a conflict in the testimony.

(6) We can, after a painstaking examination of this record, find no substantial reason why the judgment in this case should be reversed. The defendant, it is true, was convicted upon the testimony of convicts; but their testimony was corroborated in material ways by witnesses who had never been convicted of crime, and whose characters were in no way impeached.

It is also true that it was during the progress of the trial developed that the defendant, for a previous murder, had been, by a valid judgment of a court of compe-

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tent jurisdiction, sentenced to death, and that the death sentence so imposed upon him had been by the Governor commuted to life imprisonment. The fact that the defendant was a life convict was, of course, competent, and the fact that the state, to show this, was required to show a judgment for murder in the first degree imposing the death penalty, followed by the commutation to which we have above referred, could not have prejudiced the defendant in the eyes of the jury. The fact that *commutation* of a sentence is granted by the chief executive has some tendency, at least, to lead the mind to the conclusion that the commission of the crime was attended with palliating circumstances rendering the previous greater penalty inequitable and unjust. It is not claimed that the jury which tried the case was not impartial. They were simply, when they passed upon the defendant's case, dealing with a man who, by a previous sentence of a court, had been cut out of society and condemned to a life of penal servitude.

Much of the testimony came from sources which the law does not regard as reliable; but that character of testimony, even when not corroborated, is declared by the law to be sufficient to authorize and sustain convictions of crimes of the highest magnitude. An impartial jury has declared that the defendant is guilty, and he is, under the judgment of the court, now under sentence of death. No good reason for a reversal of that judgment having been shown, it follows that the judgment of the court below must be affirmed.

Affirmed. All the Justices concur.

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Ex Parte Johnson.***Murder.***

(Decided June 30, 1913. 63 South. 73.)

Homicide; Self-Defense; Duty to Retreat.—Where the evidence was in conflict as to whether defendant was in danger at the time of the killing, the refusal to charge that if defendant was free from fault in bringing on the difficulty, he was under no duty to retreat unless he could have retreated without increasing his danger, or with reasonable safety, was error to reversal.

(Dowdell, C. J., and Mayfield, J., dissent.)

CERTIORARI to Court of Appeals.

Luther Johnson was convicted of murder. The conviction having been affirmed by the Court of Appeals (8 Ala. App. 14, 62 South. 450), he brings certiorari. Reversed and remanded.

Charge 14 referred to is as follows: "If defendant was free from fault in bringing on the difficulty, he was under no obligation to retreat, unless you believe he could have retreated without increasing his danger, or with reasonable safety."

JAMES J. RAY, NORMAN GUNN, M. L. LEITH, and MAYHALL & STAGNER, for appellant. The appellate court was in error in holding that charge 14 requested by the defendant was properly refused.—*Bluett v. State*, 151 Ala. 41, and cases there cited.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The court properly refused charge 14 on the authority of *Kennedy v. State*, 140 Ala. 1.

MAYFIELD, J.—The majority of the court are of the opinion that charge 14, requested by the defendant,

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stated a correct proposition of law applicable to the case, and that its refusal by the trial court was reversible error. The Court of Appeals justified its refusal upon the ground that the evidence was in conflict as to whether defendant was in any danger at the time he shot deceased. This, in our opinion, did not justify its refusal by the trial court.

The charge stating a correct proposition of law which was applicable to the case, the accused could not be deprived of his right to have the jury instructed as requested because the evidence was not without conflict as to whether or not the defendant was in any danger when he killed deceased. There was evidence tending to show that defendant was in great danger, and that he was injured by being cut with a knife in the hands of the deceased at the time of the killing. The jury may have believed this evidence, and hence the law of the charge was applicable, and the accused had the right to have the jury instructed upon the law as to this phase of the evidence. It was not the object or purpose of this charge to state the law as to the kind of danger—whether actual or apparent, great or small—which would excuse failure to retreat or justify self-defense. It did not predicate an acquittal upon any state of facts or of evidence. As was said of a similar charge in *Kennedy's Case*, 140 Ala. 1, 9, 37 South. 90, it does not appear that, on the facts postulated, the defendant had the right to kill or injure the deceased. It does not profess to deal with other elements of self-defense, such as real or apparent danger to life or limb. In *Kennedy's Case* the charge did deal with the character of the danger, as being real or apparent, and not with freedom from fault, or inability to retreat. The charge in this case does not deal with the element of

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danger, but with freedom from fault, and inability to retreat.

Charges like the one under consideration and the one in *Kennedy's Case* have often been distinguished from that class or classes of charges held bad, which postulated certain facts and then, on the facts so postulated, requested an acquittal, or that the jury should find so and so. This charge merely correctly states one of the elements of self-defense, as the charge in *Kennedy's Case* stated another. The distinction between charges of these two classes has been frequently pointed out by this court. See *Millender's Case*, 155 Ala. 17, 20, 46 South. 756. Charges practically like this—in fact, almost copies, word for word—have been frequently held to be proper charges by this court, and their refusal held to be reversible error. And in those cases, as in this, the jury had the right to find that the accused was not in danger when he killed the deceased. See *Bluett's Case*, 151 Ala. 41, 44 South. 84, and *Deal's Case*, 136 Ala. 55, 34 South. 23. In the last-mentioned case Justice Sharpe says: "In view of the whole evidence, and especially of that phase of it favoring the defense, the defendant was entitled to have the jury instructed as proposed by charge 12, that 'if the defendant was free from fault in bringing on the difficulty, then he was under no duty to retreat, unless you believe he could have retreated without increasing his danger, or with reasonable safety.'" This case clearly decides that the defendant had the right to this charge upon his own phase of the evidence. In *Bluett's Case* and in *Deal's Case* there was evidence from which the jury could find that defendant was not in any danger. The court, in the opinion in the latter case, says the only evidence of an attack with a knife made by Hatcher had relation to a time preceding the difficulty in which the defendant cut him.

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We find no other reversible errors, but as to the one pointed out the judgment and decision of the Court of Appeals must be reversed.

Reversed and remanded.

MAYFIELD, SAYRE, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. DOWDELL, C. J., and MCCLELLAN, J., dissent.

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Violating Motor Vehicle Law.

(Decided June 30, 1913. 63 South. 201.)

1. *Constitutional Law; Presumption; Statutes.*—Where it is reasonably doubtful whether a statute is constitutional the doubt should always be resolved in favor of its constitutionality.

2. *Same; Construction.*—Constitutions are adopted for practical purposes and are entitled to practical and reasonable interpretations, and if, when thus interpreted, a statute meets the constitutional provisions, its constitutionality should be upheld.

3. *Same; Extrinsic Aid In.*—Where the language of the statute is clear and unambiguous, and there is no room for construction, the courts cannot attempt to arrive at the intention of the lawmakers by considering extrinsic matters, such as debates of the legislature or the debates of the Constitutional Convention.

4. *Licenses; Motor Vehicles; Constitutionality.*—Section 221, Constitution 1901, is intended to prevent discrimination against counties and municipalities by the levy of one tax for the sole benefit of the state to the exclusion of the counties and the municipalities, and such constitutional section is not violated by Acts 1911, p. 636, since the act expressly provides for the apportionment of the revenue thus raised between the state and the county, or incorporated town or city upon a basis of forty and sixty per cent.

(McClellan and Mayfield, JJ., dissent.)

CERTIORARI to Court of Appeals.

Robert H. Bozeman was convicted of violating the Motor Vehicle Law, and appealed to the Court of Appeals, where the judgment of conviction was affirmed,

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and he seeks to review such judgment by certiorari. Writ denied.

ARRINGTON & HOUGHTON, for appellant. The act under consideration is violative of section 221, Constitution 1901.—*City of B'ham. v. So. Ex. Co.*, 164 Ala. 533; *Little v. Foster*, 130 Ala. 163; *Ex parte Mayor, etc.*, 78 Ala. 23; *Lehman v. Robinson*, 59 Ala. 241; *State ex rel. Covington v. Thompson*, 129 Ala. 106; *State ex rel. Robinson v. McGough*, 118 Ala. 166; 8 Cyc. 840. Appellant further contends that the license fee is in exercise of the police power, and that its amount is unreasonable and void; if an exercise of the police power it cannot become a revenue measure; if a revenue measure, it is void because passed during the last five days.—*Casey v. Brice*, 55 South. 810; *Commissioners v. Boyd*, 188 Mass. 79; *State v. Parker*, 59 South. 741; *Van Hook v. City of Selma*, 70 Ala. 361; *Smith v. Com. Ct.*, 117 Ala. 196. The act violates section 2, article 4 of the Federal Constitution.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. The act in question is constitutionally valid, and should be upheld as such.—*Gentry v. City of Mobile*, 54 South. 488; *City of B'ham. v. So. Ex. Co.*, 164 Ala. 529; *Kemmemar v. State*, 150 Ala. 74. Where a statute is clear and unambiguous, it needs no construction, and the court will not consider such extrinsic matters as legislative debates for the purpose of arriving at the intention of the act.—*Little v. Foster*, 130 Ala. 163. This defendant is not in position to raise the constitutionality of the act in the method here contended for.—*State ex rel. Thomas v. Gunter*, 170 Ala. 165; 49 N. E. 582; 47 N. W. 44; 8 Cyc. 791. The act is not a revenue statute but a license

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statute.—*Dunbar v. Fraser*, 78 Ala. 538; *Shepherd v. Dowling*, 127 Ala. 1.

DE GRAFFENRIED, J.—This case involves the constitutionality of section 7 of what is known as the "Motor Vehicle Law" and which is as follows: "The following license tax or registration fee shall be charged on motor vehicles used for private use: Seven and one-half dollars upon each motor vehicle having a rating of less than twenty horse power; \$12.50 upon each motor vehicle having a rating of twenty horse power and less than thirty horse power; \$17.50 for more than thirty and less than forty horse power; \$20.00 upon each motor vehicle having a rating of forty horse power, or more; and such fee shall be based on the insurable horse power of the car. Twelve dollars and a half on each electric motor vehicle, and fifteen dollars on each motor vehicle propelled by steam. Three dollars on each motorcycle. The following license tax or registration fee shall be charged on motor vehicles used for hire: Upon each motor vehicle used for public hire in transporting passengers or freight \$25.00. Each manufacturer or dealer in motor vehicles shall pay a license tax of \$100.00. Each person, firm or corporation conducting a garage, or garages, shall pay a license tax of one hundred dollars, for each garage. Said several sums of money charged as a license tax herein shall be paid to the Secretary of State and forty per centum of the gross revenue derived from any incorporated city or town shall revert to the treasurer of the city or town in which the owner or licensee resides, and forty per cent. of the gross revenue derived from any county outside of any incorporated city or town shall likewise revert to the treasurer of said county. The registration fee or license tax shall be in lieu of all other privilege li-

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censes which the state, or any county or municipality thereof might impose, but nothing in this section shall be construed to prevent the collection of any ad valorem tax.”—Laws 1911, p. 636.

It is contended that said section violates section 221 of the Constitution and is therefore void. Section 221 of the Constitution is as follows: “The Legislature shall not enact any law which will permit any person, firm, corporation, or association to pay a privilege, license, or other tax to the state of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state.”

It is contended that said section of the “Motor Vehicle Law” is void because it *permits* the appellant, Bozeman, to pay a license tax to the state of Alabama for the privilege of running his “motor vehicle” and *prohibits* cities, towns, and counties in the state from requiring a license tax from him for the privilege of running his “motor vehicle” in such cities, towns, or counties. In other words, says the appellant, the above section 7 of the “Motor Vehicle Law” permits persons, firms, corporations, and associations to pay a privilege or license tax to the state of Alabama and relieves them from the payment of any other privilege and license taxes in the state. It is therefore, according to the appellant’s contention, violative of the above-quoted section 221 of the Constitution.

1. It is one of the cardinal rules governing the construction of statutes that, when the question as to whether a particular statute is or is not constitutional is *reasonably* in doubt, then the doubt should be resolved in favor of the constitutionality of the act.—*Lovejoy v. City of Montgomery*, 9 Ala. App. 466, 61 South. 597, present term; *State ex rel. City of Mobile v. Board, etc., Commissioners*, 180 Ala. 489, 61 South. 368.

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The reason for the above rule is that the Legislature which passed the act is presumed to have sat in judgment, while the act was before it, upon the question as to whether the Legislature possessed the constitutional power to make such a law. That body having passed the act, the law presumes that the judgment of the Legislature was that the act was constitutional. This judgment of the Legislature, while not conclusive upon the courts, is entitled to, and under the above rule must receive, great weight at the hands of the courts. It is a solemn thing for a court to strike down a statute, and when it does so its reason therefor should be clear and strong and should lead to the irresistible conclusion that the act is invalid. The people of Alabama, when they adopted the present Constitution, gave forcible evidence of their recognition of and their acquiescence in this legal truism. Local legislation had, before the adoption of the present Constitution, been a menace to the security of healthful general laws; and, to emphasize their distaste to legislation of that character, the people expressly declared in section 105 of the Constitution that "no special, private or local law, *except* a law fixing the time of holding courts, shall be enacted in any case which is provided for by general law, or when the relief sought can be given by any court of this state; *and the courts*, and *not the Legislature*, shall judge as to whether the matter of said law is *provided for by a general law*, and as to *whether* the relief sought can be given by any court," etc. The italics in the quoted section 105 of the Constitution were placed there by the writer for the purpose of showing how emphatically the people, when they adopted the present Constitution, recognized the rule of construction to which we have above referred.

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2. The purpose of the people when they adopted the above-quoted section 221 of the Constitution is, when read in the light of the legislative history of the state, plain and unmistakable. The Legislature had not been unaccustomed to pass acts which required of those who desired to carry on a particular character of business in the state for which a license tax might be lawfully required to pay a license tax for the state *only* and in which the state only participated. Cities and towns were thus frequently left without power to derive *any revenue* in the shape of license taxes from those to whom they were constantly furnishing municipal protection. It was this inequality which said section 221 of the Constitution was intended to prevent, and it seems that the act under consideration in no way defeats or comes in conflict with the purposes of said section. The act, it is true, levies only one privilege tax, but it equitably divides the tax so levied between the state and its towns, cities, and counties and thus carries into effect the true purpose of said section 221. If the tax was so distributed among the cities, towns, and counties as to *clearly indicate the legislative purpose to defeat the will* of the people as expressed by them in said section, then an entirely different question would be before us. Courts have with persistent frequency called attention to the fact that Constitutions are adopted for practical purposes and are entitled to reasonable and practical interpretations; and, when a statute meets the provisions of a Constitution which is thus interpreted, its constitutionality should always be upheld.—*Lovejoy v. City of Montgomery, supra.*

We are not inclined to adopt the view that the act in question appears, on account of the manner in which the license fund is distributed, to be in conflict with the above constitutional provision. On the contrary, as

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already stated, it shows, on its face, an equitable distribution of the license tax between the state and its various political subdivisions, and carries, therefore, on its face a legislative effort to meet the requirements of said constitutional provision.

There is on file in this case, which will be published as a dissenting opinion, an opinion prepared by Mr. Justice MAYFIELD. If the Legislature in this act had, to quote the language of Mr. Justice MAYFIELD, given the "lion's share or the house's share" to the state or to its towns and cities and counties, then the act might be subject to criticism and its constitutionality might be called into serious consideration; but the apportionment of the license tax imposed by the act is equitable and just and for that reason the act is not subject to this criticism. In this connection it may be of service to call specific attention to section 2086 of the Code of 1907. *There* the Legislature fixed the privilege tax to be paid to the *state* at \$4,000, and in the same *identical* act *fixed* the *exact* amount which might be levied upon express companies, by cities and towns, for the privilege of doing business in such cities and towns. The amount of the tax which *each* city and town might levy for the stated purpose was fixed with as much definiteness as if *each* city and town in the state had been *named* in the act and the amount which *each* town could *so* levy had been definitely fixed at a named sum in the act. The act was, however, held by this court to be a valid exercise of legislative power.—*City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 South. 159.

The reasoning of this court in the opinion which was handed down in the above case (and the opinion was unanimously concurred in by all of the *then* members of this court), it seems to us completely answers all ar-

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guments which can be advanced against the constitutionality of the act now under consideration. The only material difference between the section of the Code which was held to be constitutional in *City of Birmingham v. Southern Express Company*, *supra*, and the act now under consideration is, in so far as the question under discussion is concerned, simply one of machinery. Both acts effect the same purpose, and, while there is *less machinery* provided for in the act now under consideration than was required by said section 2086 of the Code, the true legal effect, in so far as the question we now have in hand is concerned, of the act under consideration and said section 2086 of the Code is the *same*. In the above case the court said, "The Legislature has not seen fit to delegate the power to fix the amount of this license or privilege tax;" and it upheld the said section of the Code as violative of no provision of the Constitution. In the act under consideration "the Legislature has not seen fit to delegate the power to fix the amount of this license tax," and we can see no reason why this act is not also, upon the identical reasoning of this court in said case of *City of Birmingham v. Southern Express Company*, *supra*, a valid exercise of legislative authority. In the instant case the method of enforcing the municipal tax is more direct than is the method provided in said section 2086 of the Code, but we can see no reason why a legislature may not *directly* do anything which it may *by an indirection* do.

The above case of *City of Birmingham v. Southern Express Company*, *supra*, was referred to by the Court of Appeals in its able and exhaustive opinion on file in this case, and it seems to us that the conclusions which the Court of Appeals reached in that opinion are not only well based but that in its opinion that court has given a clear and unanswerable exposition of the law of this case.

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3. We quote with approval the following from the language of the Court of Appeals in its opinion in this case: "When the language as used by the lawmakers is plain, it is the duty of the courts to obey; no discretion is left; and courts should not stray into bypaths or search for reasons outside of the plain letter of the law upon which to rely for the purpose of giving a different meaning or interpretation, for 'when the language is plain it should be considered to mean exactly what it says.'—*Little v. Foster*, 130 Ala. 163 [30 South. 477].

* * * When the meaning of a constitutional provision is plainly expressed by its words, there can be no occasion or excuse for a resort to extrinsic sources of information as to its import. As in such case the court would not be justified in according to the provision any meaning other than that which its words express, it would be wholly inappropriate for the debates of the constitutional convention on the occasion of its adoption of the provision in question, or substitutes or amendments then proposed or rejected, to be looked to to find another meaning to impute to the language used."—*Robert H. Bozeman v. State of Alabama*, 7 Ala. App. 151, 61 South. 604, present term, and authorities there cited.

Mr. Justice MAYFIELD, in his able dissenting opinion in this case, has referred to the debates of the constitutional convention, when the section now under consideration was before that body, but the debates of that convention upon the particular subject are, in fact, strong evidence of the wisdom of the above-quoted language of the Court of Appeals. During the debate on that subject, when section 221 was first offered to the convention, the chairman of the committee from which it emanated said: "I desire to say for the information of the convention with reference to this section that it

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is designed to meet a situation which exists in Alabama to-day. I will illustrate this by saying that the Southern Express Company has procured the passage by the Legislature of a law authorizing it to do business in this state upon the payment of a certain license to the state, and it has been held by the Supreme Court, in a case originating in the city of Anniston, that this license paid to the state was in lieu of all other licenses which could be charged to the express company for doing business in Alabama. As the gentleman in the convention know, in the cities in this state, every person, firm, or corporation that is engaged in business in the city limits pays into the city treasury a certain privilege or license tax for doing business in that city. The railroads, the street railroads, the telegraph companies, the telephone companies, and all other corporations and individuals pay this license, but there is not a town or city in Alabama that has been able to collect a license from the Southern Express Company on account of this decision. I submit, gentlemen, that it is not right or proper to allow the Legislature to barter and traffic with corporations at the expense of the municipalities in this state; and, if it is right and proper that all corporations should pay this license, it is right that this particular corporation should pay it. This explains the section as introduced."

The section was discussed at some length by members of the convention, and we herewith quote the conclusion of the discussion: "Mr. Weatherly: 'Mr. President, I favor the idea of allowing a municipality to impose a license tax upon any corporation that does business within its limits. I think that it is right, and I think that power should be amply preserved to the municipalities of the state, but I desire to call the attention of the convention to a contingency which might

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arise in the future somewhat like the contingency or situation that has arisen with reference to the taxation of railroad corporations. Wherever a railroad or other like corporation does business through a continuous part of the territory of a state, running through one county after another, or one city after another, if the county or municipality is alive to its own independence and free action in the levying of taxes, it gives rise to inequalities and injustice; hence it has been found necessary in the state of Alabama, and in a great many other states, in fact, I believe in nearly all the states of the Union, if not all, in the matter of taxation of railroad property to put the power of taxation in the hands of a state board.' Mr. Graham (Montgomery): 'Isn't it a fact that railroad companies in Alabama pay these taxes in every town and city through which they pass?' Mr. Weatherly: 'Certainly they do; I freely admit that; and I say the other corporations ought to do it, too. I am not making that point, but I am making the point that you ought not to withdraw it from the power of the state of Alabama, in case need should be, to take upon itself the right of levying all these taxes uniformly and distributing pro rata the license taxes to the municipalities. That is the proposition. I do not think that the state of Alabama should collect a municipal tax (a privilege tax) and put it in the treasury and deny it to the municipality, but the time may come when the state of Alabama may want to say to its people, "I take back to myself the power of levying these taxes." "I will levy a privilege tax for the city of Montgomery of so much upon a certain corporation and for the city of Mobile of so much," and then the state of Alabama will distribute it to the cities equitably. This section prohibits the state of Alabama from doing anything of that sort.' Mr. Boone: 'I will

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ask you if the purpose of this section is not to prevent the state from taking to itself all these licenses, and what you urge is not applicable to this section because the state could levy the tax and distribute it under this still to the cities and towns?" Mr. Weatherly: 'I haven't so read it. It says that "the General Assembly shall not enact laws which will permit a person, firm, corporation or association, of any character, to pay a privilege license or other tax to the state of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state." As I read that, it prohibits the payment of any privilege, license or license taxes to the state, and thereby relieving them of paying it to the city or municipality.' Mr. Boone: 'Isn't the object of that section to prohibit them from taking those licenses away from the city?' Mr. Weatherly: 'Certainly, but I say that it goes further than that.' Mr. Boone: 'Does it prevent the state levying a license tax and distributing it under an equalization scheme?' Mr. Weatherly: 'I think it does. I think it would prevent the Legislature from passing a uniform law of that character. That is the very thing that section prohibits, and it is too broad. I will vote for a section which will simply impose the duty upon these municipalities of paying privilege taxes and so regulating that it will be done equitably, but I am opposed to the section as it stands. It is too broad, because it prohibits the state, in case public policy should require that it should take into its hands the duty of regulating these things, from doing it, and we ought not to pass the section in the language in which it is framed.' Mr. Beddow: 'I call for the previous question on the section.' The main question was ordered."

The plain purpose of said section 221 is thus shown by the remarks of the chairman which we have above

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quoted and which purpose was, we think, as we have above stated it to be. The quoted portions of the debate between Messrs. Weatherly, Graham, and Boone show that, when the section was before the convention an *opponent* of the section placed upon the measure the construction which appellant now seeks to have placed upon it, while a *friend* of the section placed the same construction upon it which the Court of Appeals, without regard to the debates, as under the rules of law it should have done, has placed upon it. In fact, a candid statement with reference to the debates leads us to say that they are at best confusing and give but little information which can be of any value whatever to a court in passing upon the question before us.

It seems to us that in this case the Court of Appeals reached the proper conclusion and that, in all things, its opinion in this case correctly states the law.

The writ of certiorari is denied.

DOWDELL, C. J., and ANDERSON, SAYRE, and SOMERVILLE, JJ., concur. MCCLELLAN and MAYFIELD, JJ., dissent.

MAYFIELD, J.—I cannot concur in the opinion or in the decision in this case. Both, in my judgment, are certainly and fundamentally wrong. The constitutional provision in question, as may be seen from the majority opinion, in which it is set out, in terms says that “the Legislature shall not enact any law which will permit any person, firm, corporation, or association to pay a privilege, license, or other tax to the state of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state.” The statute in question clearly and indubitably attempts to do exactly what the constitutional provision says shall not be done. It levies *one tax*, makes it payable *to the state*,

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and relieves every person, firm, corporation, or association that pays it "from the payment of all other privilege and license taxes *in the state.*"

The language of the statute is as follows: "(The registration fees imposed by this act upon motor vehicles) *shall be in lieu of all other privilege licenses which the state, or any county or municipality thereof might impose,*" etc. How it is possible to hold that this statute is not contrary to and in conflict with both the spirit and the letter of the Constitution, I confess I cannot understand. The language, the object, and the purpose of both the constitutional provision and the statute are plain and unmistakable. The latter attempts to do exactly (nothing more nor less than) what the former attempts to prevent. There can be no doubt that they both refer to the same thing; one prohibits the thing, and the other authorizes it; and yet the majority opinion and decision in this case, by a process of reasoning which I cannot understand, upholds both the statute and the constitutional provision.

The error, in my judgment, into which both the Court of Appeals and this court have fallen came from reading into the constitutional provision an exception (a proviso) which is not in the Constitution. In other words, the statute is upheld solely upon the theory and ground that a part of the proceeds of this unlawful levy and collection, after it is so unlawfully levied and collected, reverts to the municipalities, cities, towns, or counties, which are thus deprived of their taxing power over the subjects in question. It is not only conceded, but it is decided in this case, that the purpose of this constitutional provision was to prevent the Legislature from depriving the various municipalities, counties, cities, and towns of the power to levy, and to collect after being levied, those license and privilege taxes

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which they were otherwise expressly or impliedly authorized by the Constitution to levy and collect; and this provision of the Constitution was certainly declaratory and in recognition of the constitutional right of these municipalities to so levy and to so collect such taxes. If the municipalities had no such constitutional right or power to so levy and collect such taxes, and the provision did not confer such right, then the provision in question would be wholly nugatory. That such municipalities have always had such right and power, unless taken away by a statute like the one in question, is both conceded and decided in the majority decision and opinion, as likewise is the proposition that the certain purpose and object of the constitutional provision in question was to prevent the Legislature from doing in the future what it had been prone to do in the past—to take away from these municipalities this particular right and power to levy and collect privilege and license taxes like the tax in question.

For fear that I may misinterpret the opinion, I will here quote what my Brother DE GRAFFENRIED in an able opinion says was the object and purpose of the constitutional provision. He states: "The purpose of the people when they adopted the above-quoted section 221 of the Constitution is, when read in the light of the legislative history of the state, plain and unmistakable. The Legislature had not been unaccustomed to pass acts which required of those who desired to carry on a particular character of business in the state for which a license tax might be lawfully required to pay a license tax for the state only, and in which the state only participated. Cities and towns were thus frequently left without power to derive any revenue in the shape of license taxes from those to whom they were constantly furnishing municipal protection. It was this unequal-

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ity which said section 221 of the Constitution was intended to prevent, and it seems that the act under consideration in no way defeats or comes in conflict with the purposes of said section. The act, it is true, levies only one privilege tax, but it equitably divides the tax so levied between the state and its towns, cities, and counties and thus carries into effect the true purpose of said section 221. If the tax was so distributed among the cities, towns, and counties as to *clearly indicate* the *legislative purpose* to *defeat* the *will* of the people as expressed by them in said section, then an entirely different question would be before us. Courts have with persistent frequency called attention to the fact that Constitutions are adopted for practical purposes and are entitled to reasonable and practical interpretations; and, when a statute meets the provisions of a constitution which is thus interpreted, its constitutionality should always be upheld." Herein lies the error into which by Brothers and the Court of Appeals have fallen. We are not dealing with the propriety or with the equity or with the policy of this statute, touching the disposition or division it makes of the taxes which it levies and collects for the state; but we are dealing with the question of the authority and right of the Legislature to enact this statute which, in terms, levies upon citizens a tax which is expressly prohibited and deprives the counties and the cities of the right and power to levy and collect a like tax, which admittedly they had before the passage of the statute in question, and of which right and power the Constitution said the Legislature should never thereafter deprive them.

The right and power to levy a given tax, or the right and power to deprive counties and cities of their constitutional authority to levy and collect their own taxes, cannot be determined by the disposition which is

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made of the tax after it is collected. This is the self-same argument that was advanced by the British Parliament when they levied the stamp tax upon the American Colonies. Parliament said to the Colonies, "You ought to be satisfied, because after we levy and collect the tax we pay the greater part of it back to you." But the Colonies, through Benjamin Franklin, replied, "We deny your right to levy or collect the tax, even though you should pay it all back to us." Is it possible, under our form of constitutional government, that a statute which provides for a tax which is expressly prohibited by the Constitution can be justified upon the ground that the taxes so collected are equitably disbursed? The court, I think, concedes that, if the taxes so collected by the state were not equitably disbursed (that is, were not ratably divided between the state and the counties and municipalities), "an entirely different question would be before us." If I thought the statute could be upheld on the ground of an equitable disposition of the funds, I am not prepared to admit that the disposition is equitable. The upkeep of the public roads is placed chiefly upon the counties. Automobile and other motor vehicles chiefly use and wear out public roads. Under this statute the counties, for all practical purposes, are deprived of one of their chief sources of revenue. Why should not those who most use the public roads, and who most need good roads, pay most to keep them up? Under the present statute the counties will not get one dollar out of every hundred collected. I am not prepared to say that this is equitable.

If the constitutional provision were of doubtful meaning, then I would agree that that construction should be adopted, if reasonable, which would uphold the statute rather than the one which would strike it down. But when, as in this case, both the letter and

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the spirit are clear in meaning, and the statute attempts to do exactly what the Constitution plainly says shall not be done, I must stand by the Constitution and let the statute go down. I feel no hesitancy in striking down any statute which, in my judgment, is plainly and unmistakably in violation of a constitutional provision; and this I conceive the present statute to be. Such an act or statute, if such it may be called, is not law; it is legislative spoliation and destruction of the Constitution. I cannot consent to the doctrine that the law is whatever the populace at the moment may determine to be in accord with their sense of expediency or right or whatever a legislative majority may see fit to enact. Law is something more than, not merely the equivalent of, written enactments or judicial decisions. It is true that our law is to be found or sought in our written Constitutions, statutes, judicial decisions, and commentaries; yet it is not to be found in these alone, nor, perhaps, as Judge Dillon says, is it to be chiefly found there. Its sources are almost innumerable and of course are unknowable to the masses of the people, being but imperfectly known to the wisest of lawyers and judges; yet the system is such that, except in rare cases, any man with a pure heart, and imbued with a sense of justice, finds his own conduct to be in conformity with the laws of our country, thousands though they be. This is certainly strong proof of the ethical nature and the moral basis of our laws.

As is well known, and as has been so often repeated by this and other American courts, the fundamental, basic difference between our civil laws and those of other countries is that we have a written Constitution, which is the paramount law—the ark of the covenant of our fathers—and courts are constituted the guardi-

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ans of this ark. This fundamental difference between our laws and those of England was well put, if not best put, by Gladstone when he said, "As the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." The British Constitution is changeable at the will of Parliament. As a civil lawmaking power, the British Parliament is omnipotent, and its omnipotence is responsible only to itself. With us the Constitution is unchangeable except by the people who made it; and until it is changed it is as binding upon the Legislature as it is upon the judicial and the executive departments and upon the citizen. Statutes, therefore, may not change or conflict with its provisions and hope to receive the sanction of law by the courts or by the people. Such statutes are not law.

If the statute in question is valid, then of course the Legislature can prevent all cities, towns, and counties from levying any privilege or license tax for any purpose and can give these various municipalities whatever the Legislature and this court may deem proper and equitable to compensate them from thus taking away their taxing power in this respect. I concede that this could be done but for the Constitution; but if the Constitution does not prevent what the Legislature has attempted, as to taxing motor vehicles, then of course it does not prevent the Legislature from depriving the various municipalities of all power and right to levy or collect any license or privilege taxes; and the Legislature will doubtless proceed to strip these bodies of such power and right, for it would be a great source of revenue if 60 per cent. of all the license and privilege taxes paid in the state should be paid *to the state*. If this

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constitutional provision in question does not prevent the Legislature from levying and collecting one license or privilege tax for the state, in lieu of all others by the various municipalities, then the state can certainly levy and collect one ad valorem tax in lieu of all other ad valorem taxes now levied and collected by the various towns, cities, and counties. It is true that the Constitution prohibits the Legislature from levying an ad valorem tax of more than 65 cents on each hundred dollars worth of property; but the Constitution authorizes each county to levy and collect a tax of 50 cents on each hundred dollars worth of property, and also authorizes each town or city to levy and collect a tax of 50 cents on each hundred dollars worth of property; and hence the Legislature may make one levy and one collection, for the entire state, of \$1.65 on every hundred dollars worth of property and then prorate the funds equitably among the cities, towns, and counties (that is, allow all the cities, towns, and counties 40 per cent. of the whole and assign to and retain for the state 60 per cent.). I submit that such a statute would not be as clearly and as certainly unconstitutional as the one upheld in this case. Such a one I suppose is only impliedly prohibited by the Constitution while the one at bar is expressly prohibited.

The question the court has for decision in this case is not the propriety, policy, or equality of a state tax law which deprives the cities, towns, and counties of the right to levy similar taxes; but it is legislative power and competency to pass such a statute when the Constitution says it shall not be done. If the Constitution had said that these municipalities should not be deprived of this kind of revenue, then there would be for decision the question whether the given statute did so deprive them of their revenue. But the Constitution

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in effect, though not in terms, says that they shall not be deprived of the right, privilege, or power of levying and collecting this tax for themselves in such amount (within the maximum) and for such purpose as they each may deem proper; and it says almost, if not quite, in terms, that the Legislature shall not levy one tax for the state and thereby relieve the taxpayer from liability, as to similar taxes, to the towns, cities, and counties.

I am utterly unable to understand how or why this statute does not, in effect if not in terms, do exactly what the Constitution says shall not be done. If the statute in question does not do what is prohibited by the Constitution, I am at a loss to know how one could be drafted that would violate this particular provision of the Constitution. The majority of the court say it does not violate the Constitution because it distributes the tax after it is thus levied and collected. How this disbursement of the tax, after it is collected, can affect the legislative power or competency to levy the tax and to take away the power of the towns, cities, and counties to levy a like tax, I cannot understand.

I agree with Rufus Choate and Judge Dillon that the greatest achievement in American statesmanship is that which clothed American courts with the power, and charged them with the duty, to declare an act of the Legislature void when it is contrary to the Constitution and to ascertain the repugnancy and to pronounce the legal conclusion. It was said by Mr. Choate and quoted and approved by Mr. Dillon: "That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the executive, to have vindicated it by that easy yet adamant demonstration, than which the reasonings of mathematics show nothing surer, to have inscribed this vast

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truth of conservatism upon the public mind, so that no demagogue, not in the last stage of intoxication, denies it, this is an achievement of statesmanship of which a thousand years may not exhaust or reveal all the good.' Other nations have what they call Constitutions or fundamental laws. England, for example. But no provision is beyond the transcendent and omnipotent power of Parliament. And therefore De Tocqueville denied that England had in reality a Constitution. His striking passage on this subject is: "The Parliament has an acknowledged right to modify the Constitution; as therefore the Constitution may undergo perpetual changes, *it does not in reality exist*; the Parliament is at once a legislative and a constituent assembly.' In the American conception of the office and effect of a Constitution, De Tocqueville's criticism is just. Belgium and France have written Constitutions, but, since they have no legal sanction, they are mere glittering declarations of abstract principles of political morality of action, having no force except such as public opinion may give them. They are not laws, since their restrictions and directions will not be enforced by the courts. We are told on unquestioned authority (Dicey, Constitution, p. 144) that 'during a period of more than 50 years no Belgian judge ever pronounced a parliamentary enactment unconstitutional,' and that 'no French tribunal would hold itself at liberty to disregard an enactment, however unconstitutional, passed by the National Assembly, inserted in the Bulletin des Lois, and supported by the force of the government.' Foreign statesmen and lawyers, after observing the workings of our Constitution in this regard for more than a century, at length join in praising the wisdom of the American device. Thus Dicey in his Oxford Lectures (1886), on the Law of the Constitution, says:

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“This system [the American system], which makes the judges the guardians of the Constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.’—Lect. 3, p. 125. ‘The glory of the founders of the United States is to have devised or adopted arrangements under which the Constitution became in reality, as well as in name, the supreme law of the land.’—Lect. 4, p. 145.”

That the Constitution makers intended to prohibit just such legislation as is attempted in this case I think is clearly shown by the record of the debates and proceedings of the constitutional convention. In discussing the wisdom and propriety of the section, one member of the convention said: “You ought not to withdraw it from the power of the state of Alabama, in case need should be, to take upon itself the right of levying all these taxes uniformly and distributing pro rata the license taxes to the municipalities. That is the proposition. I do not think that the state of Alabama should collect a municipal tax (a privilege tax) and put it in the treasury and deny it to the municipality, but the time may come when the state of Alabama may want to say to its people, “I take back to myself the power of levying these taxes.’ ‘I will levy a privilege tax for the city of Montgomery of so much upon a certain corporation and for the city of Mobile of so much; and then the state of Alabama will distribute it to the cities equitably. This section prohibits the state of Alabama from doing anything of that sort.”

A substitute for this section was proposed by another member to the convention, which read as follows: “If the Legislature enacts any laws which will permit a person, firm, corporation or association of any character to pay a privilege license, or other tax to the state of Alabama and relieve him or it from the payment of

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all other privilege and license taxes in this state, it shall provide for a just proportion of such tax to be distributed among the several municipalities in which such person, firm, corporation or association does business." The substitute was rejected by a vote of 60 to 13.

Another member said in the convention, relative to the amendment: "Is it not a fact from your reading of the substitute proposed to be offered by the gentleman from Clarke that it is left entirely with the Legislature as to what proportion they should allow to the cities and they might make it one-tenth or so that the cities would get a dollar apiece?"

So the convention certainly went on record as being opposed to allowing the Legislature to do exactly what it attempted to do in this act. We find no constitutional provision, similar to the one in question, in any of the Constitutions of the other states. The provision in question first appeared in our Constitution of 1901.

It is, however, a matter of common, and therefore judicial, knowledge that prior to our Constitution of 1901 most of the charters of municipal corporations were granted by separate local statutes as to each municipality, and that these charters, or many of them, were amended at every session of the Legislature, and that as a rule they authorized the municipality to levy and collect license and privilege taxes. There was also passed at every session an act known as the general revenue bill, and it always contained a schedule of license and privilege taxes levied and collectible for the state. There were also passed at nearly every session of the Legislature other general statutes levying a special privilege or license tax upon various public service corporations doing business in the state, such as telegraph, telephone, express, and Pullman palace car companies; and many of the municipalities, by virtue of their char-

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ters, also levied and collected similar license and privilege taxes from such companies. In order to prevent the municipalities from thus levying and collecting such taxes, the custom grew up of making these taxes very large in the general bills and making them in lieu of all other taxes of that nature, thus repealing those provisions of the municipal charters which allowed the levy and collection of such taxes. Then, at the next session of the Legislature, many of these municipalities would have their charters re-enacted or amended so as to except them from the provisions of the general statute. And then the Legislature would wittingly or unwittingly re-enact or amend the general law so as to again repeal the provisions of the charters of the municipalities which had been thus re-enacted or amended. And thus this game of battledore and shuttlecock went on between the municipalities on the one side and the public service corporations on the other.

It was the evident purpose of the constitutional convention to put an end to this kind of legislation, and section 221 of the Constitution forms the prohibition or barrier which it erected against such practice.

The above is a part of the legislative and judicial history of this state. The peculiar conditions touched upon have been before mentioned and referred to, in the opinions of this court, in the cases of *Birmingham v. Southern Express Company*, 164 Ala. 533, 51 South. 159; *Douglass v. Anniston*, 104 Ala. 291, 16 South. 133; *Southern Express Company v. Tuscaloosa*, 132 Ala. 326, 31 South. 460; *Holt v. Birmingham*, 111 Ala. 369, 19 South. 735; *Hewlett v. Camp*, 115 Ala. 499, 22 South. 137.

Some of the above cases also dealt with another constitutional provision, not involved in this case, which was as follows: "The General Assembly shall not have

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power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state."

It is very true that a municipal corporation cannot exercise any powers except such as it is authorized to exercise by the Legislature; but it is likewise true that the Legislature cannot exercise a power in a manner or by means expressly prohibited by the Constitution. These license and privilege taxes, whether levied for the state or for a municipality, cannot lawfully be levied or collected in a mode or manner, or by a species of legislation, which is expressly or by necessary implication prohibited by the Constitution.

For these reasons I am of the opinion that the particular sections of the act above referred to, to wit, sections 7, 9, and 32, are in violation of section 221 of the Constitution and are therefore void.

Ex Parte Smith.

Practicing Medicine Without License.

(Decided June 30, 1913. 63 South. 70.)

Physicians and Surgeons; Regulation; Constitutionality.—As applied to a mental healer for compensation, section 7560, Code 1907, is not an unconstitutional exercise of the police power.

CERTIORARI to Court of Appeals.

J. J. Smith was convicted of treating diseases without having obtained the certificate required by section 1627, Code 1907, and he appeals to the Court of Appeals, which court affirmed the judgment of the lower court, and he brings certiorari to review such judgment. Writ denied.

The agreed statement of facts will be found in the opinion in the case of *Smith v. State*, 8 Ala. App. 352.

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The prosecution was begun by affidavit and warrant, in the language of form 84, section 7161, Code 1907.

ESTES, JONES & WELSH, for appellant. Counsel begin by quoting from Matthew, 9th chapter, verses 20 to 22, Acts, chapter 14, verses 8 to 10, inclusive, and 1 Cor. chapter 12, and assert that the Legislature cannot directly or indirectly interfere with, limit control prohibit or confine to a certain class of citizens the right to exercise God-given skill or science of healing disease, and they cite 187 U. S. 9; 135 Fed. 1. It is insisted, therefore, that the statutes under consideration are unconstitutional and void, citing *Bragg v. State*, 134 Ala. 164; 36 Cyc. 1131; 67 L. R. A. 903; 89 Psalm 30, 82; *City Council of Montgomery v. West*, 42 South. 1000.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The writ should be denied on the authority of *Smith v. State*, 8 Ala. App. 52, and authorities there cited.

PER CURIAM.—We are of the opinion that the agreed statement of facts brought the appellant within the influence of sections 1627 and 7564 of the Code of 1907, and the certiorari to review the action of the Court of Appeals is denied.

The defendant also seeks a writ of error, as provided by the act of 1911, authorizing a review by this court of the action of the Court of Appeals in upholding the constitutionality of the foregoing statutes. We are of the opinion that the Court of Appeals correctly held that the statute was not violative of the federal or state Constitutions, in so far as it was applicable to this defendant, who practiced his system of healing for a valuable reward.

[Warrior-Pratt C. Co. v. Shereda.]

Warrior-Pratt C. Co. v. Shereda.*Damage for Injury to Servant.*

(Decided April 24, 1913. Rehearing denied June 5, 1913.
62 South. 721.)

1. *Master and Servant; Injury to Servant; Complaint.*—The complaint examined and each count held to sufficiently state a cause of action under subdivision 1, section 3910, Code 1907.

2. *Same; Independent Contractor.*—One who is engaged to mine coal in another's mine, at a place fixed by the owner's superintendent, at a stated rate per ton, and who is not in any manner under the control of the mine owner or its representatives with respect to the details of the mining is not a servant, but is an independent contractor; hence, where the complaint alleged that plaintiff was in the employment of the mine owner, and the evidence showed that he was engaged to mine coal at a certain rate per ton; and did not show that the mine owner had any control or direction over him, such mine owner was entitled to have a verdict directed for him at the suit of plaintiff under the Employer's Liability Act.

3. *Same; Presumption and Burden of Proof.*—Where the action was for injury sustained while engaged in mining coal in another's mine, there was no presumption that plaintiff was a servant rather than an independent contractor, and the burden was on plaintiff to show the existence of the relation of master and servant.

4. *Same; Instructions.*—Where plaintiff alleged that he was in the mine owner's employment but the evidence showed that he was an independent contractor, an instruction authorizing a recovery under the conditions which would render the master liable to a servant should not have been given, as under the complaint plaintiff could not recover unless he was shown to be a servant.

5. *Same; Evidence.*—In an action for injuries sustained while engaged in mining coal for a certain sum per ton, and the superintendent of the mine owner had testified that he had made the usual contract with plaintiff to drive a room in the mine, such superintendent should have been permitted to testify as to the nature and character of the contract.

6. *Same.*—Where the testimony was conflicting whether the rock which struck plaintiff fell from the roof of the entry where the evidence tended to show that it was defendant's duty to inspect and remove dangerous rock or coal, or fell from the roof of the room in which plaintiff was working where the evidence tended to show that it was his duty to inspect or remove dangerous rock or coal, the court should have admitted all evidence calculated to show the respective duties of the mine owners and the miner, with respect to inspection or removal of coal and rocks.

7. *Same; Expert Evidence.*—Whether an entry was driven in a mine with due care and skill, was a proper subject for expert testimony.

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8. *Same; Sufficiency of Evidence.*—An allusion in the testimony of a witness to the presence of a person representing an insurance company, and his testimony that he sent into the mine and brought out the men who knew about the accident was not sufficient to show that the mine owner had insured itself against liability for injuries to plaintiff, or to make a question for the jury as to the existence of the relation of master and servant between the mine owner and plaintiff, where it was not shown by whom the insurance referred to was effected.

9. *Appal and Error; Insistence Upon; Necessity.*—Where a reversal is to be had on other ground the appellate court may point out errors which should be avoided on new trial, although not insisted upon in brief; and this is true although a judgment will not be reversed solely because of errors assigned and not insisted upon .

(Sayre, J., dissents in part.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

Action by Peter Shereda against the Warrior-Pratt Coal Company, for damages for injury while in its employment. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 2 alleges the operation by defendant of a coal mine, and that plaintiff was in the employment of defendant in said mine, and while engaged in the discharge of his duties under his employment a piece of rock or slate or other hard substance fell from the roof of defendant's mine, striking plaintiff and inflicting the injuries which are set out. It is then averred that the injuries were caused by reason of a defect in the condition of the ways, works, machinery, or plant of the defendant, and that said defect consisted in this, that defendant failed to pull down what is known as a middleman from said roof, and because thereof said middleman fell upon plaintiff, inflicting the injuries complained of, and plaintiff avers that said defect arose from or had not been discovered or remedied owing to the negligence of the defendant, or of some person intrusted by it with the duty of seeing that its way, works, machinery, or plant were in proper condition.

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Count 4 alleges the condition of the material composing the roof of defendant's mine opposite room No. 10, near first right cross-heading, at the place where plaintiff was injured, was not sufficiently sustained and held in place, and because thereof a portion of such material composing such roof fell upon plaintiff and injured him.

The exception to oral charge quoted in assignment 24 is as follows: "If you find from all the evidence that the rock fell by reason of a defect in the roof of the entry, and the superintendent, Lilich, who was also the mine boss, at the time as testified to, and several days prior thereto, knew of the defect or dangerous condition of the rock, and the defendant failed to remedy the defect, or put the rock in a safe condition, and if you further believe from the evidence that plaintiff was not such employee or servant whose duty it was to remedy such defect under the evidence before you, then you should find for the plaintiff, notwithstanding the rock broke off several inches within the neck of the room wherein it was the duty of the plaintiff to see to the safety of the roof."

The testimony of plaintiff was that he was working in the room, digging coal for himself, being paid by the ton, and making over \$3 and up to \$4 per day. The superintendent testified that he gave the plaintiff the contract to drive room 10 on the first right cross. "I made the usual contract with him and marked it off. Plaintiff was paid 42½ cents per ton for the coal." It was attempted to be shown by this witness what was the nature and character of the contract, but on objection the evidence was excluded.

J. T. STOKELY, and R. H. SCRIVNER, for appellant. Both of the counts on which the case went to the jury were under the Employer's Liability Act, and of course

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the burden was on plaintiff to bring himself within the class of persons for whose benefit the statute was enacted.—*Ga. Pac. v. Propst*, 4 South. 711; *Harris v. McNamara*, 12 South. 103; *Dallas M. Co. v. Townes*, 49 South. 989. Under the evidence plaintiff's status was that of an independent contractor.—*Harris v. McNamara*, *supra*; *Dallas M. Co. v. Townes*, *supra*; *Lookout M. I. Co. v. Lea*, 39 South. 1017. It follows that the court's oral charge was improper.—*U. S. C. I. P. & F. Co. v. Driver*, 50 South. 119; *Ala. S. & W. Co. v. Thompson*, 52 South. 75; *Frierson v. Frazer*, 142 Ala. 232; sec. 5362, Code 1907. Counsel discuss exceptions to evidence, with the insistence that the court erred in not admitting it.—*Ga. Pac. v. Propst*, *supra*; *L. & N. v. Allen*, 78 Ala. 494; *A. G. S. v. Arnold*, 84 Ala. 159; *Holland v. Tenn. Co.*, 8 South. 524; *R. & D. R. R. Co. v. Bivins*, 15 South. 515.

FRANK S. WHITE & SONS, for appellee. The Employer's Liability Act applies in this case, for the relationship is created when one commences to perform labor or service for another whether by contract or otherwise, and the fact that payment is to be made by the piece does not preclude a person from being an employee within the purview of the statute.—*Woodward I. Co. v. Curl*, 153 Ala. 215; *Bir. R. Mills v. Wampold*, 143 Ala. 115; *Cahaba S. M. Co. v. Pratt*, 146 Ala. 245; *Tutwiler C. & M. Co. v. Farington*, 144 Ala. 157; *Bir. M. & C. Co. v. Skelton*, 149 Ala. 465; *Mascot C. Co. v. Garrett*, 156 Ala. 290; White's Personal Injury, sec. 69; Roberts & Wallace Employer's Liability, 261. The affirmative charge is never properly given where the evidence affords reasonable inferences of material fact unfavorable to the party requesting it.—*Peters v. So. Ry.*, 135 Ala. 537; *Bessemer Co. v. Tillman*, 139 Ala. 462.

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No exception was reserved to the oral charge after the court's explanation, and hence, the exception must fail. In any event, the charge was not error.—*Sloss-Sheffield v. Stewart*, 55 South. 785. If the charge was misleading the duty was on defendant to request explanatory charges.—*B. R. L. & P. Co. v. Simpson*, 59 South. 213. The complaint sufficiently stated the relation of master and servant, the duty growing out of the relation, and the negligence proximately resulting in the injury, and this was sufficient.—Authorities supra; 162 Ala. 570; 144 Ala. 221; 122 Ala. 231; 134 Ala. 293; 136 Ala. 335; 138 Ala. 487; 141 Ala. 206; 128 Ala. 305. The fourth count of the complaint was not subject to demurrer.—Authorities supra. A party cannot complain of the action of the court in sustaining objections to a question where the court is not informed as to the answer expected unless it is disclosed by the question that it would call for affirmative admissible evidence.—*Farley v. Bay Shell Road*, 27 South. 774; *Ross v. State*, 139 Ala. 144; *B. R. L. & P. v. Selhorst*, 165 Ala. 481. Some of the questions clearly called for the mental operations of the witness, and were properly refused.—*Dunn Bros. v. Gunn*, 149 Ala. 597; *Merchants' Bank v. Acme L. Co.*, 160 Ala. 435; *Simmons v. State*, 158 Ala. 8. The court properly sustained demurrers to plea 10.—*Osborn v. Ala. S. & W. Co.*, 135 Ala. 571; *Tenn. Co. v. Burgess*, 158 Ala. 519; *B. R. L. & P. Co. v. Bush*, 56 South. 732.

McCLELLAN, J.—The complaint, as amended, contained four counts. All of these carried the material averment of relation of master and servant between plaintiff (appellee) and defendant (appellant) at the time plaintiff was injured by the falling of rock from the roof of the mine. Only counts 2 and 4 were passed to the jury. These were drawn under the first sub-

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division of the Employers' Liability Act (Code 1907, § 3910). Neither of these counts was subject to the demurrer. Both sufficiently, under our rule, allege and describe a defect in the condition of the ways, works, etc., of the defendant's mine, and conclude in the words of the statute whereby negligence is charged, as upon that defective condition, to have proximately caused plaintiff's injury.

We are not able to find in this record any evidence, or legitimate inference from the evidence, tending to support the allegations of relationship of master and servant between plaintiff and defendant when he was injured. The application to the evidence here, of the accepted and often reaffirmed doctrine of *Harris v. McNamara*, 97 Ala. 181, 12 South. 103, and *Lookout M. I. Co. v. Lea*, 144 Ala. 169, 39 South. 1017, defining an independent contractor, leaves no doubt that the relation, in employment, alleged did not exist when the injury occurred. The sum of that evidence is that plaintiff engaged to mine coal in defendant's mine, at a stated rate per ton, at a place and within the limits fixed by defendant's superintendant. It is not shown, in any degree, that defendant or its representatives had any control or direction in respect of the details of the mining, of when or how plaintiff should do what he had engaged, as stated, to do. There is no presumption that he was a servant rather than a contractor. The burden was assumed by and was upon him to show that he bore at the time the relation of servant, in order to avail of the statute's provisions. He has not shown that defendant had "control over the *means and agencies*" by which the mining of the coal in the area of his labors "was to be produced." Accordingly the defendant was entitled to the general affirmative charge requested by it.

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And upon the like considerations the court erred in the excepted to extract from the oral charge quoted in the twenty-fourth assignment of error. The plaintiff could not recover, under the complaint, unless he was shown to be a servant of the defendant.

The court also erred in restricting the defendant in its effort to show the full, whole contract or agreement between plaintiff and defendant. If they engaged to the "usual" effect "for driving rooms" in that mine, the terms that engagement comprehended were proper matters for the jury's consideration.

There was irreconcilable conflict in the testimony upon the issue whether the rock which fell upon plaintiff came from the roof of the *entry*, where there was evidence tending to show that it was defendant's duty to inspect for and remove dangerous rock or coal, or from the roof of the room or room neck in which there was testimony tending to show it was the miner's duty to inspect for and remove dangerous rock or coal. If the pleadings upon another trial again present that issue, all evidence calculated to discover the respective duties of mine operator and miner with respect to inspection for and the removal of loosened rock or coal should be received. On this trial the court appears to have unduly restricted the evidence in that regard. It may be quite material to determine at what point (if so) between the entry and the room neck or room the duty of inspection and care in this regard closed for one and began for the other, and equally as material to determine exactly wherefrom, with reference to the roofs of the entry, room neck or room, the rock causing the injury fell, or at what point, if so, with like reference, the initial leaning of the rock from its place above occurred.

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Whether the entry from the roof, of which there was evidence tending to show the rock in question fell, was driven with due care and skill was the proper subject of inquiry of the expert witness, Robert Neil.

The judgment is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

ON REHEARING.

MCCLELLAN, J.—In an exhaustive argument appellee insists the court is in error in finding that there is no evidence, nor inference from evidence, in this record tending to support the material averment of the existence, at the time of injury, of the relationship of master and servant between the plaintiff and defendant. The argument, and authorities cited, have been carefully examined and considered. In addition the court en banc has re-read the entire record touching this point of controversy. The doctrine of the cases noted, in this connection, in the original opinion is manifestly sound. That that doctrine is applicable to the case at bar does not, in the judgment of the court, admit of doubt. When to the entire evidence offered and admitted is applied the doctrine summarily stated, as upon the cases cited, in the original opinion, the conclusion is, in our judgment, unescapable that there is an entire want of evidence tending in any degree to establish the relationship alleged. The bare allusion in the testimony of Lulich to the presence of a person representing an insurance company, and the statement by the witness that he “sent into the mine and brought the men out who knew about the accident,” to plaintiff, did not tend to show that the company had insured to protect itself from damages for injury to the plaintiff. By whom the in-

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surance referred to was effected was left entirely unstated.

Counsel for movant for rehearing are correct in their suggestion that there was no insistence in brief for appellant upon the exceptions, assigned for error, taken because of the denial to it of the opportunity to show the terms of the *contract* between plaintiff and defendant. Had that matter been the sole error committed by the trial court, of course a *reversal* could not have been predicated of it. However, since a reversal was found necessary on the major proposition arising out of the erroneous refusal to defendant of the general affirmative charge, it was not thought amiss to indicate, in a general way, other errors which to avoid on the succeeding trial appeared desirable.

The exception in this connection was reserved during the examination in chief of Lillich, and not on the cross, as movant's brief seems to assert.

The twenty-fourth assignment of error complained of a part of the oral charge of the court, and this assignment was urged for error on pages 7 and 8 of the brief for appellant, filed on original submission.

The application for rehearing is denied.

SAYRE, J.—(dissenting).—I concur in the reversal for other reasons; but I cannot assent to the proposition that the general charge should have been given on the ground that plaintiff failed to show that he was an employee rather than an independent contractor. Plaintiff assumed the burden of proving that he was an employee of course. But when plaintiff proved his employment as a manual laborer to dig coal, *prima facie* he showed that he was an employee within the meaning of the Employer's Liability Act, and the fact that he was paid by the ton was not sufficient to make of him

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an independent contractor as matter of law. On the facts proved, and on the common implications of the language used by the witnesses, I think the question whether plaintiff was an employee within the meaning of the statute was properly submitted to the jury.

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Injury to Servant.

(Decided May 15, 1913. 62 South. 536.)

1. *Master and Servant; Injury to Servant; Employee Engaged in Making Safe Place.*—Where a mine employee was injured by the fall of loose rock while he was engaged in clearing the hallway of such rock so as to make it safe for the use of other employees, and before knocking a prop from under such rock, which resulted in the rock falling, he sounded the roof, but it gave no evidence of being loose or otherwise unsafe, the master was not liable for the injuries, notwithstanding it was the duty of the bank boss to examine and see that the roofs of hallways were in reasonably safe condition; if the rock was loose it was the duty of the injured employee to have discovered it, and if it was not loose the bank boss was not negligent.

2. *Appeal and Error; Harmless Error; Not Affecting Result.*—Where in no event a plaintiff is entitled to recover, a judgment against him will not be reversed because of special errors committed on the trial.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by Ernest Adams against the Corona Coal & Iron Company for damages for injuries suffered while in its employment. Judgment for defendant and plaintiff appeals. Affirmed.

GUNN & POWELL, for appellant. The court erred in sustaining demurrer to count 13.—*Tutwiler C. & C. Co. v. Farington*, 144 Ala. 165. Pleas 5, 6, 7, and 9 were fatally defective.—*Osborn v. Ala. S. & W. Co.*, 135 Ala. 573; *M. & B. R. R. Co. v. Harbin*, 84 Ala. 183; *H. A.*

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& *B. R. R. Co. v. Walker*, 91 Ala. 435. Pleas 3, 8 and 10 were fatally defective.—*Lockhart v. Sloss-Sheffield*, 51 South. 627; *Jones v. Pioneer M. & M. Co.*, 149 Ala. 402. Pleas 2 and 4 were mere conclusions.—*Osborn v. Ala. S. & W. Co.*, *supra*. Under the evidence the jury would have been authorized to find that the superintendent had been negligent in the exercise of the superintendence, and therefore, the question became one for the jury.—*T. C. I. & R. R. Co. v. Bonner*, 164 Ala. 61; *K. C. M. & B. v. Burton*, 97 Ala. 240. The master has the burden of showing that the servant knew of the defect.—*Jackson L. Co. v. Cunningham*, 141 Ala. 206. See *Sloss-S. S. & I, Co. v. Grune*, 159 Ala. 178.

J. T. STOKELY, and BANKHEAD & BANKHEAD, for appellee. In no event was plaintiff entitled to recover under the evidence, and hence, any special errors committed on the trial will not bring about a reversal.—*Bienville W. W. Co. v. City of Mobile*, 125 Ala. 178; *Merrineather v. Sayre M. & M. Co.*, 62 South. 70.

DE GRAFFENRIED, J.—The plaintiff, while at work as a shift leader in a hallway of a coal mine of the defendant coal and iron company, sustained a dangerous and painful injury to his person. The plaintiff, acting upon the theory that his injuries were due to the actionable negligence of the defendant, or of an agent or servant of the defendant having superintendence intrusted to him, brought this suit to recover the damages which he sustained by reason of such personal injuries so received by him.

1. The plaintiff, at the time he received his injuries, was clearing a hallway of loose rock. This hallway was used by the various employees of the defendant in going to and from the mine. The hallway, at one time, con-

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tained a seam of coal, but the coal had been taken out, and it was the duty of the plaintiff, as shift leader, to clear the bottom of the hallway of loose rock, and to remove from the top of the hallway all loose rock that could be removed therefrom, and to prop up such loose rock as could not be removed from the top. The plaintiff's duty, therefore, was to prepare the hallway so that it could be conveniently and safely used by the other servants of the defendant. The manner in which the plaintiff received his injuries is thus stated by the plaintiff: "I went to my place then and pulled down all of the loose rock that I could detect, and sounded the place I was to work under. It was my duty to square up that rock. It was my duty to examine the place where I was at work, and to take down or prop all the loose rock that I could find. It was my duty to examine the roof. I sounded the roof either with an ax or hammer. I examined the roof, and discovered some loose rock around the edge of the brush, but not any under the brushing. I was looking for loose rock when I examined the roof, but did not know as much about it, as some miners do. It was my duty to remove the loose rock that was left there by the day shift and to gob it on the right side. It was my duty to remove all the rock in that eight-foot space. I was working on up toward the face of the coal, with the purpose of making this haulageway a sufficient height so that the men and mules could pass through. I sounded the rock that fell on me before I went to work under it, and it sounded safe. I detected nothing about it that indicated danger. The corner of the rock that fell on me was resting on a prop. There was a double row of props between the haulageway and the gob place. Rafe was on the opposite side of the rock from where I was when I went to work. Rafe was somewhere about the rock pile when I went over to

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knock that prop out. The hammer that I used to knock the prop out would weigh, in my judgment, four or five pounds. The handle to the hammer was in my judgment about 15 or 18 inches long. The reason I wanted to knock that prop down was to give myself room to throw that rock back and gob it. The space between the props was about 12 or 18 inches. After I had knocked the prop out, I would have had a space of 30 or 36 inches. The second prop next to the right rib was directly behind the one that I undertook to knock out. The coal had been taken out from under the rock. I don't know just what the height of the roof was there; we could use about 3 ft. and 10 in. timbers. I was under the rock that fell on me when I hit the prop with the hammer, the prop moved an inch or two and the rock fell on me. The prop fell out from under the rock about the time the rock fell on me. I fell with my head facing toward the gob side. The whole piece of rock fell on me. It did not break before it fell, it broke as it hit me when it fell. It was necessary to take that rock down in order to make the haulageway the necessary height, when we got to it. After I had cleaned up that gob I would have had to take that rock down or shoot it down. That was what I was there for, to pull down rock. I was considered over Rafe Agnew, my helper, and he was subject to my instructions. It would have taken myself and Rafe Agnew about two hours to have removed the rock from the roof that fell on me. After I got the rock gobbled it was my duty to take down the rock. That would have been the next rock for me to have taken down."

The evidence in the bill of exceptions tends to show that it was the duty of the bank boss to examine and see that the roofs of the hallways were in a reasonably safe condition, but the evidence of the plaintiff affirm-

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actively shows that the rock which fell on him when he knocked the prop from under it, when *sounded* by him, gave no evidence of being loose or of being otherwise unsafe. In fact the plaintiff was there that night, to remove *that particular rock*, whether loose or otherwise, and the knocking of the support from the rock was the cause of the fall. The duty of the plaintiff, on the occasion named, was to remove the rock which fell on him, and through the plaintiff, as shift leader, the defendant was, at the time of the plaintiff's injury, performing the duty which the law cast upon it, viz., to provide a safe place in which its employees could work. According to the plaintiff's own testimony if the rock was loose it was his duty to have discovered that it was loose. If it was not loose, then the bank boss could not have been negligent.

Under the evidence in this case the plaintiff was not entitled to recover. As in no event can the plaintiff prevail in this litigation, we do not consider any of the questions presented by the pleadings. "It is settled here that an appellant can never have a reversal for special errors committed on the trial from the judgment on which he appeals if in no event he could prevail in the litigation."—*America Merriweather, as Adm'x, etc., v. Sayre Mining & Manufacturing Co.*, 182 Ala. 665, 62 South. 70; *Bienville Co. v. City of Mobile*, 125 Ala. 178, 27 South. 781.

The judgment of the court below is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Amer. Cast I. P. Co. v. Landrum.

Injury to Servant.

(Decided May 1, 1913. Rehearing denied June 19, 1913.
62 South. 757.)

1. *Master and Servant; Injury to Servant; Sufficiency of Evidence.*—In an action for injuries to a servant, where there was no evidence to show that the injury was caused by defective appliances furnished by the master as charged, except the fact that the accident happened, and the inference was just as reasonable that it was caused by plaintiff's negligence, or that it was the result of an inevitable accident occurring without the negligence of anyone, the employee was not entitled to recover.

2. *Same; Contributory Negligence.*—Where it was the duty of an employee to adjust the pins in a clevis by means of which a core used in hoisting was attached to the hoisting apparatus, he could not recover for injuries caused by the core falling due to his own failure to properly insert the pin.

3. *Same; Burden of Proof.*—Negligence on the part of the master cannot be inferred from the mere fact that an injury happened to an employee and the burden is on the injured employee of showing negligence of the master as an affirmative fact, and he does not sustain such burden by showing that the employer may have been negligent.

4. *Same; Question for Jury.*—Where the testimony shows that any one of several things may have been responsible for the injury, for some of which the employer is responsible, and for some of which he is not, the jury should not be permitted to guess as to the real cause of the injury when there is no satisfactory foundation in the testimony for that conclusion.

(McClellan, J., dissents.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by John Landrum against the American Cast Iron Pipe Company for damages for injuries received while in its employment. Judgment for plaintiff and defendant appeals. Reversed and remanded.

J. T. STOKELY, and R. H. SCRIVNER, for appellant.
Counsel discuss errors assigned relative to the pleadings

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and to the admission and rejection of evidence, and insist that prejudicial error had been committed. They further insist that there was no conflict in the evidence, and nothing from which the jury could determine as to just how the accident happened, and that therefore plaintiff failed to carry the burden of affirmatively showing negligence on the part of the master, and that the verdict should have been directed for defendant.—*Peters v. So. Ry.*, 135 Ala. 533; *Richards v. Sloss-Sheffield*, 146 Ala. 254; *L. & N. v. Binion*, 14 South. 619; *L. & N. r. Davis*, 91 Ala. 487; *L. & N. v. Lowe*, 48 South. 99; *L. & N. v. Campbell*, 12 South. 474; *Tuck v. L. & N.*, 12 South. 168; *T. C. & I. Co. v. Harms*, 52 South. 827; *Seaboard M. Co. v. Woodson*, 11 South. 877.

DENSON & DENSON, for appellee. The evidence was such that the jury could reasonably have inferred that the accident happened because of the negligence of the master, and this being true it was wholly immaterial how long it had existed before the accident.—*L. & N. v. Harkins*, 92 Ala. 244; *Tuck v. L. & N.*, 98 Ala. 152. The evidence was certainly sufficient to carry the question to the jury.—*Elliott v. R. M. C. I. Co.*, 108 Ala. 642; *Cobb v. State*, 115 Ala. 625; *Pell City M. Co. v. Cosper*, 55 South. 216.

SAYRE, J.—Defendant (appellant) was engaged in making iron pipe. Plaintiff was its employee. Count 2 averred that plaintiff's injury was caused by a defect in defendant's apparatus for hooking up cores. Count 3, which was added during the progress of the trial, averred that the plaintiff's injury was caused by the negligence of defendant's superintendent in that he "negligently allowed the pins which held the cores in the shacks to be made weak and brittle." The fact was

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that after the core was drawn up out of the pit, in which it stood while receiving the molten iron, in some way it became detached from the chain by which a crane had lifted it and fell upon plaintiff (appellee), causing the injuries for which he sought to recover.

Appellant has argued the proposition that count 2 insufficiently designated and described the part of defendant's works or plant alleged to be defective, and hence that there was error in overruling its demurrer. But, in the view we have taken of the case, we have not found it necessary to pass upon the question so raised.

In lifting cores from the pit the hoisting apparatus of a crane was attached to the core by means of a clevis, or shack, and a pin which passed through the holes in the clevis and the core. It was plaintiff's business to adjust these pins when the core was ready to be lifted and then, after the core had been lifted, to detach the lifting apparatus by withdrawing the pin. The clevis and pins would take up some heat from the metal of the pipe, but on ordinary occasions, when things were moving normally, the pins did not get so warm but that plaintiff and other employees might safely handle them with leathers which were supplied by defendant and commonly used by employees, but when some hitch occurred in the operation the pins would become so hot that they could not be so handled. Occasionally also the pins would, when heated to an unusual degree, bend under the strain of lifting the cores from the pit.

Plaintiff sought to show that defendant followed or allowed its employees to follow the bad practice of cooling the pins by dipping them in a barrel of water when they became overheated, thus so impairing their strength and efficiency that under the weight of the cores they would either bend or break, and his evident purpose was to have the jury infer that on the occasion of plaintiff's

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injury the pin then and there in use either bent or broke, and the jury, it seems, did so infer.

Upon due consideration of all the evidence, we are of opinion that the inference was not warranted. There was nothing offered on plaintiff's part to show that the pin in this case either bent or broke except that the accident happened and had to be accounted for in some way. On the other hand, defendant's evidence tended strongly to show that the pin neither broke nor bent, but that it fell from its place after the core had been lifted from the pit and while it was being transferred, or being prepared for transfer to a car for removal, and from this it might have been inferred that it fell from its place because it had not been properly inserted. But as we have said it was plaintiff's business to insert the pin, and of course it was his duty to insert it properly. If his injury resulted from his failure to do so he cannot recover.

Negligence on the part of the master is not to be inferred from the bare fact that an injury happens to his employee. The complaining employee assumes the burden of showing as an affirmative fact that the employer has been guilty of the negligence charged in the complaint. It will not serve his purpose to show that his employer may have been negligent; the evidence must point to the fact that he was. In this connection we quote the apt language of the Supreme Court of the United States in *Patton v. Texas Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361: "Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when

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there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Our conclusion is that there was not sufficient evidence to authorize a finding for the plaintiff on the issues proposed to the jury by the pleading. The jury with equal assurance might have found that plaintiff's unaided negligence was the cause of his injury, or that it was the result of one of those inevitable accidents which may occur in the course of every business without culpable neglect on the part of anybody, and in this state of the case defendant was entitled to the general charge.

Reversed and remanded.

ANDERSON, MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. McCLELLAN, J., dissenting. DOWDELL, C. J., not sitting.

MCCLELLAN, J.—(dissenting).—The trial court refused the general affirmative charges, requested by the defendant (appellant), as to counts 2 and 3. Under the evidence shown by the bill of exceptions, it is my opinion that the trial court did not err in that action. Accordingly, I cannot concur in the view prevailing with the majority.

The second count attributes the injury to a defective apparatus for hooking up cores. The third count attributes the injury to the superintendent (Samples) for that he "negligently allowed pins which held the

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cores in the shacks to be made weak and brittle." The fact of injury and the relationship of master and servant was shown without dispute. The superintendency of Samples in the premises was supported by tendencies in the evidence. If I understand the effect of the majority opinion, it is, that there was no evidence of defective apparatus, in the particular that a pin, constituting a part thereof, was insufficient or inefficient for the purpose; and, also, that there was no evidence that the superintendent was negligent in that he allowed the pins which held the cores to be made weak and brittle.

I have carefully read the bill of exceptions; and it is clear to me that there is evidence tending to support the counts in the respects the contrary is ruled here.

In view of the retrial likely to occur, it is not necessary or desirable that a discussion of the evidence be now undertaken by me.

In my opinion *Patton v. T. & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, is without any application to this case. The doctrine of that case was announced and applied in *Tinney v. C. of Ga. Ry. Co.*, 129 Ala. 523, 30 South. 623; and *Miller-Brent Co. v. Douglas*, 167 Ala. 289, 52 South. 414, among others. There being evidence, and reasonable inference therefrom, supporting the material averments of the counts, there could be no uncertainty within the doctrine of the *Patton*, *Tinney* or *Douglas Cases*. If, as the majority hold, there was no evidence whatever to support material averments of the counts, then the plaintiff was due to fail for want of evidence to carry the burden assumed by him.

[Louisville & N. R. R. Co. v. Williams.]

Louisville & N. R. R. Co. v. Williams.

Injury to Person on Track.

(Decided June 17, 1913. Rehearing denied June 30, 1913.
62 South. 679.)

1. *Evidence; Conclusion.*—Whether a person does or does not know a particular fact is a mere conclusion, and a witness should not be permitted to state whether another person does or does not know a fact.

2. *Same.*—Where a witness was in a position to observe, he may be able to state that another person present saw certain conditions which were visible; hence, where a party was injured in crossing a spur track of defendant railroad a witness may state that the conductor in charge of the train saw persons crossing and recrossing the tracks, as such is a collective statement of fact and not a conclusion.

3. *Trial; Reception of Evidence; Objection.*—Where plaintiff was run down on the spur track, and a witness had answered in the affirmative, the question whether the conductor had been in upon the spur track before the day of the accident, and that he knew how many people crossed there, the refusal of the trial court, on motion to exclude the entire answer on the ground that it was irrelevant was proper as the objection should have pointed out the erroneous part, the gratuitous statement of the witness's conclusion as to the knowledge of the conductor.

4. *Appeal and Error; Harmless; Evidence.*—Where a witness has stated the facts upon which his conclusions are based, to allow the witness to testify as to whether another person did or did not know certain facts, will not necessitate a reversal, although error.

5. *Railroads; Persons on Track; Injury; Complaint.*—A complaint against a railroad company for injuries received by a person in crossing a spur track of defendant railroad company, alleging that defendant's servant in charge of the cars, while acting within the line and scope of his employment willfully or wantonly ran down plaintiff, proximately causing his injuries, sufficiently charges a willful or wanton injury.

6. *Same; Evidence.*—Where plaintiff was the servant of a lumber company, which had a spur track running through its yards, and was struck and injured by cars shunted down the track, evidence that cars were not customarily kicked into the spur track, without warning, and that the railroad did not object to the employees of the lumber company crossing the track, was admissible, as the servants of the lumber company were not trespassers, but had a right to cross the tracks upon the premises of their master.

7. *Same.*—Evidence that the servants of the lumber company crossed the tracks at other places than that at which the accident occurred, is admissible in an action against a railroad company for injuries to a servant of the lumber company who was run down by cars

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shunted upon the private track of the lumber company; the restrictions relating to public crossing not being material.

8. *Same; Duty of Railroad*.—Where a lumber company had a private spur track through its yards, and many of its employees continually crossed the tracks in the performance of their master's business, the railroad company operating over such track is bound to exercise a high degree of care and to anticipate their presence on the tracks.

9. *Same; Duty to Maintain Lookout*.—To render a railroad company liable to a plaintiff who was struck by cars shunted by one of its engines upon a private spur track, it is not necessary that the public should have ordinarily used the track, or that the servants of the railroad company should have discovered plaintiff's peril, it being liable for the willful and wanton failure of its servants to take proper precaution.

10. *Same; Negligence*.—While flying switches do not constitute negligence per se, yet if the servants of a railroad company shunted cars without warning upon a spur track of a lumber company over which the servants of the lumber company were constantly passing, and such tracks were so obstructed by lumber that those crossing them could not see approaching cars, the railroad company was guilty of negligence as a matter of law.

11. *Same; Willful or Wanton Injury*.—Where the servants of a railroad company had knowledge of the very frequent presence of the employees of the lumber company on the spur track, and the likelihood that their acts would result in injury, the company is guilty of a willful and wanton wrong, where its servants shunted cars down a private spur track over which servants of a lumber company were constantly passing.

12. *Same; Jury Question*.—Under the evidence in this case, it was a question for the jury whether the acts of defendant's servant was the proximate cause of plaintiff's injury, and also whether defendant's servants were guilty of a willful or wanton wrong.

13. *Same; Instruction*.—Under the facts in this case the refusal of a charge asserting that the cars must have been shoved on the track at a high rate of speed was not reversible error, because the charge is misleading; speed being a relative term, and a speed which would be high under some conditions would be deemed low under others.

14. *Same*.—A railroad company is liable for injuries received owing to the willful and wanton acts of its servants in charge of its train, although its other servants be not guilty of negligence.

15. *Same; Damages*.—Where one is run down and injured by the willful or wanton acts of the servants of defendant, in assessing the damages, the jury may not only award compensation for the injuries, but may award a further reasonable sum as punishment.

16. *Damages; Punitive*.—The facts considered and it is held that the award of \$27,000 as compensatory and punitive damages was not so excessive as to denote passion, prejudice or mistake on the part of the jury.

17. *Charge of Court; Covered By Those Given*.—The court will not be put in error for refusing charges substantially covered by written charges given.

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APPEAL from Autauga Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by Joseph E. Williams against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff was an employee of the Marbury Lumber Company, and about 2 p. m., while attempting to cross a spur track running from defendant's main line about 350 yards into the lumber company's premises, between its sawmill and planing mill, and used only in connection with its business, was run down and seriously injured by a cut of freight cars kicked or pushed by defendant's locomotive or engine from its main track. Plaintiff's evidence tended to show that there were four cars in the cut, that they were moving at the point of collision at a speed of from eight to twelve miles an hour, on a downgrade; that plaintiff was carried along about 100 feet after being hit, and was taken from under the second car after it had stopped; that no warning was given of the approach of the cars, and no one was sent ahead to see that the track was clear; that no one was on the cars at the time of the collision; that the brakeman got on one of the cars after the accident and applied the brake; that previous to this occasion the brakeman or flagman, or the conductor Smith, would always come along and see whether the track was clear and flag the cars in, and on the first trip in that morning the brakeman came down in front of the cars; that it was customary to kick the cars onto the spur; that switching on the spur was customarily done once a day, after which the trainmen would not come back; that on this day they came and switched on the spur in the forenoon, after which they took their train to Mountain Creek, a mile or two away on the main line, and came back after an hour or so and shoved in the cars that struck plaintiff.

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The evidence shows without material dispute that the spur track curves considerably from the main track to its terminus at the Marbury Lumber plant; that lumber was piled for a great way on both sides of it about 8 feet high and within $1\frac{1}{2}$ to 3 feet of the rails at the point of collision; that plaintiff and a companion employee had left their work in the planing mill to get more lumber to work on, and had emerged from a narrow passageway between the piled up lumber, immediately upon the track, heedlessly and without stopping, looking, or listening, and was struck by the front car as he got on the track, his companion being simultaneously struck and killed; that the mills were then in operation and making such a noise that the sound of an approaching train, or its warning signals, could not be heard by one at the passageway; that plaintiff did not hear it and was unaware of its approach; and that these general conditions were known to the conductor of the train. Plaintiff's evidence tended to show, also: That the spur track ran through the lumber company's premises where about 150 of its employees were engaged at work. That crossing through its whole extent, where not obstructed, was frequently made by these employees and at all times of the day. That some one was on the track on an average of one every minute. That at the point of collision there was a regular passageway over which plaintiff was passing. That the path was visible, and was the main place of crossing, and that some one was constantly crossing there in connection with the work of the lumber plant—as one witness stated, “every minute in the day.” That Smith, the conductor of this train, had been coming in on the spur and switching cars every other day or so for about six weeks. That he had seen numbers of people on the track and had seen them crossing to and fro on the occasion of his visit, and that

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he was acquainted with conditions about the spur track and lumber plant.

There was a sharp conflict in the evidence as to the number of cars in the cut, as to the speed at which they were moving, as to the distance they ran after the collision, and as to the presence and position on the cars of the conductor and the negro brakeman before and at the time of the collision. A fuller statement as to the condition of the premises and surroundings and the mode and circumstances of the collision will be found in a report of a former appeal in this case in 172 Ala. 560, 55 South. 218. All counts on simple negligence were eliminated by charges of the court, and the case went to the jury only on the ninth count of the complaint, which was for willful or wanton negligence. The verdict was for the plaintiff for \$27,000 damages, and judgment was accordingly entered. The damages shown were that plaintiff's left leg was ground off and amputated about halfway between the knee and the ankle, and the right foot was cut off diagonally from the little toe across the instep to the heel, leaving the little toe on that part of the foot; that plaintiff was in the hospital 5 weeks and was unable to get about or to work for 13 months; that he was earning when injured \$1.50 and is now earning only \$1 a day; and that he was previously sound in body and of good health.

R. T. GOODWYN, GEORGE W. JONES, J. M. FOSTER, and S. L. FIELDS, for appellant. Henry L. Stone, of counsel. If there was wanton negligence on the part of defendant's servants, such negligence was not the proximate cause of the injury.—*N. C. & St. L. Ry. v. Harris*, 142 Ala. 249; *Bryant v. So. Ry. Co.*, 137 Ala. 488; *Western Ry. of Ala. v. Mutch*, 97 Ala. 194; *Mayer v. Thompson Hutchinson Bldg. Co.*, 116 Ala. 634; *Weatherly v. N.*

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C. & St. L. Ry., 166 Ala. 575; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216; *Wagner v. A. C. L. R. Co.*, 147 N. C. 315; *Miner, et al. v. McNamara, et al.*, 72 Atl. 138; *Lebanon L. & I. Tel. Co. v. Lanham Lbr. Co.*, 115 S. W. 824; *Barkeley v. Mo. Pac. Ry. Co.*, 9 S. W. 793; *Galveston H. & S. A. Ry. Co. v. Chambers*, 73 Tex. 296; *Berry v. Sugar Notch*, 43 Atl. 240; *Ring v. Cohes*, 77 N. Y. 83; *Murgaugh v. New York C. & H. R. R. Co.*, 49 Hun. 456; 1 Thompson on Negligence, sec. 56; 1 Bailey on Per Inj. (2nd Ed.) sec. 46; *Claypool v. Wigman*, 71 N. E. 509. The motion for a new trial should have been granted, because the verdict is contrary to the evidence.—*Bhm. Ry. L. & P. Co. v. Oden*, 155 Ala. 154; *Bhm. Elec. Ry. Co. v. Clay*, 108 Ala. 233; *Teague v. Bass*, 131 Ala. 422; *Bhm. Nat. Bank v. Bradley*, 116 Ala. 142; *Southern Ry. Co. v. Lollar*, 136 Ala. 376; *Gassenheimer v. Western Ry. of Ala.*, 57 South. 718. The verdict is excessive and the motion for a new trial should have been granted.—*A. G. S. R. R. Co. v. Burgess*, 119 Ala. 555; *So. Ry. Co. v. Crowder*, 130 Ala. 265; *C. of Ga. Ry. Co. v. Morgan*, 49 South. 865; *Standard Oil Co. v. Tierney*, 96 Ky. 89; *Heddles v. Chicago Ry. Co.*, 74 Wis. 239; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 497. A witness cannot testify as to the cognitions of another or as to what another has seen.—*L. & N. R. R. Co. v. Perkins*, 165 Ala. 471; *Lacey v. Hendricks*, 164 Ala. 280; *Travis v. Sloss-Shef. Co.*, 162 Ala. 605; *Cohn & Goldberg L. Co. v. Andrews*, 150 Ala. 368; *Nave v. A. G. S. Ry. Co.*, 96 Ala. 266. Actual knowledge by employee in charge of train that some one is likely to be on the track must be shown before jury can find defendant, through such employee, guilty of wantonness.—*A. G. S. v. Guest*, 144 Ala. 373; *Perkins v. Bhm. Ry. & E. Co.*, 132 Ala. 470; *So. Ry. v. Bunt*, 131 Ala. 591; *Glass v. Railroad Co.*, 94 Ala. 581; *Nave v. A. G. S. Ry. Co.*, 96 Ala. 264; *A. G. S. v. Wil-*

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liams, 140 Ala. 320; *So. Ry. v. Bunt*, 122 Ala. 487; *Bhm. Ry. & E. Co. v. Butler*, 135 Ala. 395; *M. J. & K. C. Ry. v. Smith*, 153 Ala. 127; *M. & C. Ry. v. Martin*, 117 Ala. 367.

HILL, HILL, WHITING & STERNE, W. H. & J. R. THOMAS, EUGENE BALLARD, and P. E. ALEXANDER, for appellee. Under the evidence in this case defendant's conductor was guilty of wantonness or its equivalent, reckless indifference to consequences.—*L. & N. v. Williams*, 55 South. 223; *A. G. S. r. Guest*, 144 Ala. 373; *M. J. & K. C. R. R. Co. v. South*, 153 Ala. 127; *B'ham Ry. Co. v. Jones*, 153 Ala. 167; *Ga. Pac. v. O'Shields*, 90 Ala. 29; *Bir. So. v. Powell*, 136 Ala. 232; *L. & N. v. Webb*, 97 Ala. 308; *Weatherly v. N. C. & St. L.*, 166 Ala. 575; 2 Thomp. on Neg. secs. 1572, 1695-97, 1717-19, and 1850; 4 Am. St. Rep. 364; 18 L. R. A. 63, and cases there cited. The damages directly followed the numerous wrongs which were proximately responsible for the injury.—*A. G. S. r. Arnold*, 80 Ala. 600; *L. & N. v. Young*, 168 Ala. 551. The court was not in error in declining to grant the motion for a new trial.—*Jones & Co., et al. v. Tucker*, 132 Ala. 305; *Williamson Iron Co. v. McQueen*, 144 Ala. 279; *Ala. Midland Ry. v. Brown*, 129 Ala. 286; *Anderson v. English & Webb*, 121 Ala. 272; *Terst Sons & Co. v. O'Neil*, 108 Ala. 250; *Morris v. West*, 101 Ala. 535; *Holland v. Howard Bros.*, 105 Ala. 539; *White v. Blair*, 95 Ala. 147; *Cobb v. Malone & Collins*, 92 Ala. 630; *Western Ry. v. Cleghorn*, 143 Ala. 399; *Southern Ry. Co. v. Burges*, 143 Ala. 374; *McClendon v. McKissick*, 143 Ala. 192; *Bingham v. Davidson*, 141 Ala. 559; *Smith v. Tombigbee & Sou. Ry.*, 141 Ala. 334; *B. R., L. & P. Co. v. Lindsey*, 140 Ala. 316; *Merrill v. Brantley & Co.*, 133 Ala. 539; *Callahan v. Nelson*, 128 Ala. 676; *Taylor v. Corley*, 113 Ala. 586; *Central of Ga. Ry. Co. v. White*, 56 South. Rep. 577.

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SOMERVILLE, J.—The complaint alleges that defendant's servant in charge of its cars, while acting within his employment, willfully or wantonly ran said cars against or upon plaintiff, thereby proximately causing the injuries described. This sufficiently charges a willful or wanton injury, as uniformly held by this court.

A witness should not be allowed to state that another person does or does not know a particular fact, this being a mere conclusion, and ordinarily the allowance of such testimony, when properly objected to, is reversible error.—*L. & N. R. R. Co. v. Perkins*, 165 Ala. 471, 51 South. 870, 21, Ann. Cas. 1073, citing numerous cases. But where the witness has stated the facts upon which his conclusion is based, the allowance of his inference also does not necessarily require a reversal of the judgment.—*Evans v. State*, 120 Ala. 269, 25 South. 175. Plaintiff's witness Snyder was asked if Conductor Smith had been in on the spur track before the day of the accident, and he answered: "Oh, yes; he knew how many people crossed there." Defendant's motion to exclude this answer on the ground that it was irrelevant and a conclusion of the witness was overruled. The question was proper, and the affirmative answer, "Oh yes," was not subject to any objection. The additional and gratuitous statement of the witness was obnoxious to the rule above stated, but the objection to the *entire* answer was properly overruled.—*Hill v. State*, 146 Ala. 51, 41 South. 621.

But, if the witness was in a position to observe, he may be able to state that another person who was present *saw* stated conditions or occurrences which were visible and open to ordinary observation. This is the statement of a collective fact which the witness may well know with certainty, and which is in accordance with

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common, every-day experience.—*International, etc., Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557; *C. of G. Ry. Co. v. Hyatt*, 151 Ala. 355, 43 South. 867. A cross-examination of the witness might have exposed the inadmissibility of his quasi conclusion, but this was not attempted.

In allowing several of plaintiff's witnesses to state that Conductor Smith saw the location of the mills and track and lumber, and saw people going on and crossing the spur track, the trial court committed no error; though, the facts being admitted, such collective statements may also without error be excluded.

It was proper for plaintiff, under the conditions exhibited, to show that no one came or was sent in advance or at the front of the cars on this occasion; that it was the usual practice to do that when cars were shoved or drawn in on the spur; that it was not customary to kick them in without warning, or without some one stationed at the front end to give warning; that plaintiff had no warning of any sort that the cars were coming as they did; and that the defendant company had prosecuted its business of switching cars on the spur without objecting to the lumber company's employees crossing the track as they were in the habit of doing.

It is to be observed that the situation here is altogether different from the ordinary case of persons crossing a railroad's tracks upon its own right of way. The spur was on the private premises of the lumber company, and was presumptively its property. It was not a highway upon which the defendant ran scheduled trains, or upon which it might switch its rolling stock ad libitum. It was, on the contrary, used merely as a service track for the lumber plant, and for the accommodation of its business. Its employees were in no sense trespassers when they went upon it or across it, but

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were at least licensees equally with the employees and cars and engines of the railroad company. And, obviously, the latter had no right to presume, and, in the absence of some contract stipulation, no right to demand, that the track should be clear whenever it might be used or suddenly occupied by rolling stock.

These conditions justified the admission of the evidence above enumerated, and the court did not err therein. Nor was it improper to allow plaintiff to show that there was crossings at other points on the spur than the point of collision as illustrative of the general conditions surrounding the use of the track. The restrictions of proof in the case of public crossings are not applicable here.

The track ran in the midst of the lumber company's yard, and between and very near to its sawmill on one side and its planing mill on the other. Its employees had frequent occasion to cross this track in the prosecution of their work in and about its mills. According to some of the witnesses, some one was on the track continuously, and on an average of one every minute during the day. It was open to the jury to find from the frequency of Smith's visits to the yard, and his opportunities to observe these conditions while they were existent, that he was acquainted with them, and had ample knowledge of the dangers to these employees attendant upon the heedless and unguarded operation of engines and cars in the midst of such an environment.

Unquestionably it was defendants duty, under these conditions, to exercise a very high degree of care and diligence to avoid injuring those persons who were rightfully upon the track, and whose presence there at all times it was bound to anticipate.

The vital questions therefore, are: (1) Did the defendant, through its servant, Conductor Smith, in

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charge of this train and these cars, omit any precaution for the safety of plaintiff, an employee rightfully on the track, which the circumstances justly demanded; (2) if so, was such omission, under the circumstances shown, an act of wanton negligence; and (3) was it the proximate cause of plaintiff's injury?

1. Flying switches, it is generally held, are not per se negligent.—33 Cyc. 953, and cases cited. But circumstances may stamp them as negligent, and in this case it was at least a question for the jury to determine. But whether negligent per se or not, "since such a practice is peculiarly dangerous, it creates a duty of unusual care on the part of the company; and there should be not only the usual signals of bell and whistle, but there should also be a flagman near the track or a watchman on the nearest approaching car, as well as other reasonably necessary precautions. [and] Where such acts are performed at a crossing in a populous town or city along which people are constantly accustomed to travel, it has been held to be negligence per se, although signals of alarm are given from the engine employed in the switching."—33 Cyc. 953b. In the present case the cars were "kicked" onto the spur by being pushed by a detached engine; the cars being then allowed to run on alone by the momentum given by the engine and by the force of gravity. This operation therefore falls within the principles that apply to the flying switch, and these principles are more vigorously applicable to a switch made upon private premises and in the midst of busy workmen.

Under the conditions here shown, the conductor's omission, if so found, to send a flagman ahead of the train to warn the employees of the approach of the cars, or to station a lookout on the foremost car for that purpose, or to adopt some other suitable and efficient means

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of warning, must be regarded as negligence in law—this in view of the estimated speed of the cars, and of the obstructions to the view of those crossing the track, and the impossibility of their hearing the noise of approaching cars while the mills were in operation, conditions inherently dangerous, and a knowledge of which might be fairly imputed to defendant's servant, Conductor Smith. —*L. & N. R. R. Co. v. Davis*, 91 Ala. 487, 8 South. 552. Some of plaintiff's evidence tends to show that it was not customary to "kick" the cars onto the spur, and that when the trains went upon it a flagman was sent ahead or stationed on the front end—a significant admission, if believed, of the requirements of the situation.

2. To the conditions above stated but one additional element is needed to render the omission of Conductor Smith to take the precautions suggested one of wanton neglect, viz., conscious knowledge by him of the very frequent if not continuous presence upon the spur of some one or more of the lumber company's employees, and of the likelihood that omission of these precautions would probably result injuriously to some one exposed to danger. Under the evidence these were jury questions, and it was fairly open to the jury to find Smith guilty of that reckless indifference to consequences which would constitute wanton wrong.—*B'ham So. R. R. Co. v. Powell*, 136 Ala. 232, 242, 33 South. 875. This conclusion does not seem to be seriously controverted by appellant, and is, indeed, scarcely open to question.

3. Defendant's main contention, urged with much force and logic, is that, conceding the omission by Smith of all the precautionary duties suggested and demanded by the situation, yet as matter of law his negligence was not the proximate cause of plaintiff's injury, and hence defendant was entitled to the general

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affirmative charge on the whole case.

Our consideration of this contention does not, however, persuade us of its validity. We do not feel justified in finding as a conclusion of law that, had a flagman been sent ahead of the cars, or had a brakeman been stationed on the end of the foremost car, plaintiff would not have been seasonably warned of coming danger; nor that, passing from the narrow passageway albeit almost immediately upon the track, plaintiff's imminent catastrophe would not have been detected in time for a warning cry to reach him soon enough to avert or mitigate the tragic result.

Our conclusion is that the trial court did not err in refusing to give for defendant the general affirmative charge.

Several special charges requested by defendant were also refused. In the main these charges were framed upon the theory that this case is analogous to the case of injury to a trespasser at a public crossing or other point on a railroad highway—a theory which is entirely erroneous and untenable.

We notice these charges briefly:

Charge 9 is argumentative, and unduly emphasizes some phases of the case. It also invades the province of the jury in attempting to instruct them as an absolute conclusion, regardless of conditions, that shoving the cars on the spur was not evidence of negligence.

Charge 11 misapplies the rule of public crossings, which is not germane to this case. It was not necessary that the *public* should have customarily used or crossed this track, nor that defendant's servant should have actually discovered plaintiff's peril before his injury, in order to make defendant liable.

Charge 13 requires as a condition to defendant's liability that the cars must have been shoved on the spur

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"at a high and rapid rate of speed." Though some of the cases may have used this expression in respect to negligence at public crossings of railroads, or like places, it is plainly inappropriate here. "Speed" is a relative term, and a rate of speed which would be deemed "high and rapid" under some conditions would be deemed low and slow under others. It would have been highly misleading to have thus instructed the jury, under the conditions here shown. The speed that is reprehensible is a *dangerous rate of speed under the circumstances*.—*A. G. S. R. R. Co. v. Guest*, 144 Ala. 373, 381, 39 South. 654. A comparatively low rate of speed may have been highly dangerous here, and so may have been a legitimate predicate for the imputation of wantonness.

Charge 15 is erroneous, or at least misleading, in requiring a finding that *all* the agents or servants in charge of defendants cars had knowledge of the specified conditions and united in intentionally running the cars as charged. This is not the law. It was here sufficient if Smith alone had the knowledge and ran the cars recklessly. Moreover, charges 10 and 14 given for defendant substantially cover the principle invoked by this charge.

Charge 16 is erroneous in its designation of plaintiff as a trespasser on the track.

Charge 17 is erroneous in requiring that there should have been crossing of the spur by *the public*, and argumentative and misleading in requiring that such crossing should have been *continual*. The true requirement is that the crossing must be of such frequency and in such numbers as to inform and warn the carrier's servant that some one is probably on the track at the particular time, and will probably be injured by running the cars at a dangerous speed without lookout and warning

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signals.—*Ga. Pac. Ry. Co. v. Lee*, 92 Ala. 271, 9 South. 230; *M. & C. R. R. Co. v. Martin*, 117 Ala. 367, 385, 23 South. 231; *Southern Ry. Co. v. Stewart*, 179 Ala. 304, 60 South. 927.

It follows that each of these several charges was properly refused.

There was a motion by defendant to set aside the verdict because contrary to the evidence, and also because excessive in amount. The damages awarded to plaintiff by the verdict of the jury are heavy. In the trial court defendant unsuccessfully moved for a new trial on the ground that the verdict was excessive in amount, and the record presents that question for our consideration here.

The jury found that plaintiff was entitled to recover damages for a wanton injury. It was their duty, therefore, to compensate him for that injury as nearly as possible, and in accordance with those standards by which an approximately just result is supposed to be reached. And it was within their discretion to further award to plaintiff such sum, not palpably unreasonable in view of the nature and circumstances of the wrong, as in their judgment would fitly punish the defendant corporation for the wanton act of its servant. It seems evident that they have exercised that discretion by the incorporation of punitive damages in their award.

The revision of such verdicts on the ground complained of has been a matter of frequent consideration by this court, and, indeed, by the appellate courts of all the states.

A statement of the grounds upon which interference with such verdicts is justified on appeal in this state will be found in *Central of Ga. Ry. v. White*, 175 Ala. 90, 56 South. 574, together with a review of some of the cases. A very exhaustive and valuable collation and

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synopsis of the American cases will be found in the notes to *Cleveland, etc., R. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 8; and *Ruck v. Milwaukee Brewery Co.*, 148 Wis. 222, 134 N. W. 914, Ann. Cas. 1913A, 1361.

In other jurisdictions we find a number of cases, where the plaintiff has suffered the loss of both legs, in which verdicts of \$25,000, \$27,500, \$30,000, and, in two cases, \$35,000, have been sustained as not excessive. In some of these it appears that the plaintiff's earning capacity was considerably greater than that of the plaintiff here; but, while that may be an important element, it cannot be regarded as a controlling factor in the amount of the verdict.—*Gulf, etc., R. Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. 653; *Id.*, 70 S. W. 359; *Texas, etc., R. Co. v. Matkin* (Tex. Civ. App.) 142 S. W. 604; *Whitehead v. Wisconsin, etc., R. Co.*, 103 Minn. 13, 114 N. W. 254, 467; *Yazoo, etc., R. Co. v. Wallace*, 91 Miss. 492; 45 South. 857; *Union Pac. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368; *St. Louis, etc., R. Co. v. Rogers*, 93 Ark. 564, 126 S. W. 375, 1199; *Reeks v. Seattle Elec. Co.*, 54 Wash. 609, 104 Pac. 126.

For the loss of one leg only, a verdict for \$25,000 was sustained in *Ehrman v. Brooklyn City R. Co.*, 131 N. Y. 576, 30 N. E. 67; for \$22,500, in *Williamson v. Brooklyn Heights*, 53 App. Div. 399, 65 N. Y. S. 1054; and for \$20,000 in *Texas, etc., R. Co. v. Brouillette*, (Tex. Civ. App.) 130 S. W. 886.

These verdicts, it is freely conceded, do not illustrate the *average* conceptions of juries, as shown by the general run of the cases reviewed in the two notes referred to, and in the brief for appellant. But, as noted by the editor of *Annotated Cases* (16 Ann. Cas. 10), the tendency in recent years has been for verdicts to award, and appellate courts to sustain increasingly larger sums

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as compensation for personal injuries. This is attributable, no doubt, to the greatly decreased purchasing power of a dollar, as exemplified in the rise in the price of nearly all commodities, and the enormous increase in the cost of living; and, in some measure, perhaps, to a higher regard for human life and the value of physical efficiency. It may be conceded that this verdict is in excess of our notions of what would be fit and just, having due regard to both compensation and punishment, and that some limit must be fixed somewhere to the expanding verdicts of juries in cases of this character. The question is in large measure, at least in its final analysis, an economic one, and its ultimate solution must perhaps be found in the adoption of general compensation acts as the best remedy for the economic waste and ethical demoralization attendant upon the present system—a policy which seems to be growing in favor among all enlightened people.

We have given very careful consideration to the case before us, and are unable to deduce, either from the circumstances of the case, or from a comparative study of other cases in this and other jurisdictions, the necessary conclusion that the verdict was the manifest result of passion, prejudice, corruption, or mistake, on the part of the jury.

Finding no prejudicial error in the record, the judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur. DOWDELL, C. J., does not concur in all that is said upon the subject of excessive verdicts.

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Injury to Person on Track.

(Decided May 13, 1912. 62 South. 724.)

1. *Railroads; Crossing Accident; Signals; Persons Entitled.*—The provisions of section 5473, Code 1907, are intended for the benefit of persons crossing the track in front of trains and passengers attempting to board the train, and not for the protection of one who attempts to climb over or between the cars while the train is blocking a public crossing.

2. *Same; Injury to Licensee or Trespasser; Duty.*—The only duty a railroad company owes to one attempting to climb over or between the cars of a train across a public highway is to exercise due care not to injure them after discovery that they are in a place of danger.

3. *Same; Crossings; Mutual Rights.*—Where a line of railway crosses a public highway, neither the railroad nor the public have an exclusive right of occupation.

4. *Same.*—The right of a railroad to obstruct a public crossing for a reasonable time gives it a right to the crossing at the time to the exclusion of any right of a pedestrian; but where such obstruction continues for an unreasonable length, the right of passage on the part of the public is restored and the railroad company must see to it that it does not injure pedestrians who are seeking to climb over or under its train, by starting the train without warning.

5. *Negligence; Contributory; Infant.*—Where the action is for injury to a boy between seven and fourteen years of age, a plea of contributory negligence of such infant should take issue as to his age, or should allege facts which rebut his presumed incompetence, and failing to do so the plea is bad.

6. *Same; Rebutable Presumption.*—Where the action is for injury to a child under fourteen years of age, and the defense is contributory negligence of such child, the presumption of his mental incapacity is a rebuttable presumption.

7. *Pleading; Complaint; Repugnancy.*—A complaint for personal injuries which charges that defendant willfully, wantonly and negligently performed the acts which caused the injury is self repugnant in failing to distinguish between willful and wanton acts and acts which are merely negligent.

8. *Same; Objection; Construction.*—Counts for injuries received by a boy because of the starting of a train, which had been blocking a public crossing, while the boy was attempting to climb over a car, which alleged in the alternative that defendant knew, or by due care should or could have known, that persons were going between the cars should be treated as counts in simple negligence and not for wanton or willful injury, in the absence of an objection to said count for repugnancy.

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9. *Appeal and Error; Harmless Error; Pleading.*—Where the court erroneously construed counts charging negligence as charging willful or wanton injury, it must be presumed that the error was prejudicial, in the absence of a showing to the contrary.

10. *Same.*—Where, after erroneously holding that counts charging simply negligence, charged willful or wanton injury, the court submitted to the jury the question of wanton injury with the instruction that contributory negligence is not an answer thereto, and the amount of the verdict indicated that punitive damages were awarded, the record shows that prejudicial error was committed.

APPEAL from Russell Circuit Court.

Heard before Hon. M. SOLLIE.

Action by Canty Chambers against the Central of Georgia Railway Company for damages for personal injuries. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

The case made by the pleadings as to the first count is that at a time named the defendant was operating and running a freight train composed of a number of freight cars and caboose and engine on its line of railway which ran east and west through the town of Hatchechubbee, Russell county, Ala., which track crosses the public highway in said village, which was the only highway along which persons on the south side could cross over to the north side thereof, and vice versa, and that part of the business houses in said village are on the south side and part on the north side of the railroad, and that the public highway is the only way of passing from one side to the other, which situation is well known to the defendant; and plaintiff avers that defendant owed the plaintiff the duty, in the operation of its trains in said village, to so operate them as to permit plaintiff and others at all times reasonable passage over said highway, but that between the hours of 10 and 11 a. m. on April 1, 1910, the defendant so willfully, negligently, and wantonly operated its said freight train along said highway, or across the same, as to entirely block and

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obstruct it for more than 20 minutes, and at a time when plaintiff was under the necessity of crossing from the south to the north side of defendant's track, but finding it obstructed by said freight train, which was extended more than 100 feet on either side of the center of the said crossing, the defendant stopped, looked, and listened, and hearing no whistle or bell whereby he might be apprised that this train was about to be moved, or was in motion, without becoming a trespasser, plaintiff climbed over, went between, or crawled under said train of freight cars on said crossing. It is then averred that plaintiff stopped, looked, and listened for 15 minutes for said train to move before attempting to cross, and defendant knew that he and other persons were being obstructed and delayed at said crossing, but notwithstanding said knowledge willfully, negligently, and wantonly failed to open said public crossing, and that by virtue thereof it was and became necessary for plaintiff to climb between the cars standing directly over said public highway, and that while plaintiff was so passing between said cars, and without blowing the whistle or ringing the bell, the train was so negligently backed or moved forward as to jerk said cars and put them in motion, while plaintiff was on the drawhead of said cars and unaware, by virtue of the negligent failure of defendant to ring the bell or to blow the whistle, that said train was in motion or about to move from the station, whereby plaintiff's left foot was so badly and seriously mashed [here follows catalogue of injuries], and that said damage is the proximate result or cause of the negligent failure of defendant to ring the bell or blow the whistle at short intervals immediately before leaving the station or while moving within or passing by said village of Hatchechubbee. The complaint alleges the age of plaintiff to be between 13 and 14 years,

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and that the reasonable use of the crossing by defendant in the discharge of its business or the operation of its train was not so long as 20 or even 10 minutes. Further allegation is made that plaintiff was an inexperienced boy and that it then and there appeared to him reasonable that the most convenient and safe manner for him to cross said crossing was by climbing over the draw-head of the cars.

Counts numbered 2, 3 and 4, as well as 5 and 6, allege the violation of the duty to plaintiff and the general public in blocking said crossing for an unreasonable length of time, but otherwise is similar to count 1.

Count 7 describes the situation in the village as set out in count 1, and the fact that the crossing was used by a large number of people and the general public at all hours of the day, which was known to defendant, and that said public highway had been so used for a great number of years; in fact, it was the only way by which the people could cross from the north to the south side of the town, and that this was generally known to defendant, and that between the hours of 10 and 11 on April 1, 1910, and just before the arrival of the passenger train going east, at which time said railroad crossing was most used by a great number of people and the general public, which fact was well known to defendant, the defendant willfully, wantonly, and negligently blocked said railroad crossing, although it was not reasonably necessary for defendant in the reasonable management of its business, and in the reasonable operation of its trains in said village to do so, by leaving said train of cars standing over said public highway crossing for an unreasonable time, to wit, 20 minutes, and by disconnecting its engine from said train of cars and using it for switching purposes at said station without disconnecting said train of cars at said public cross-

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ing, and affording the general public and this plaintiff a reasonably safe and convenient method of crossing over said railroad by means of said public highway, although plaintiff avers that defendant could have so permitted passage over said crossing to plaintiff and the general public without unreasonable trouble, expense, or delay to the defendant in the operation of its train and the reasonable conduct of its business; and that defendant in the operation of its train, and in the reasonable conduct of its business at said village, owed the general public and this plaintiff the duty to so operate its train and to so conduct its business as to afford this plaintiff and the general public an unobstructed right of way over said crossing, but that notwithstanding its duty defendant willfully, wantonly, and negligently blocked said railroad crossing in the manner aforesaid, and plaintiff avers that at this time, and for a long time prior thereto because of the willful, wanton, and negligent blocking of said crossing, a large number of people and the general public were forced to crawl over or crawl under or go between the cars of said train while it was so blocking said crossing in passing from one side to the other of said railroad, which fact was well known to defendant. And at said time and place the plaintiff avers that he was under the necessity of crossing from the south to the north side of said railroad crossing, and that he stopped and waited some 15 minutes and while so waiting he saw others crawling over or under or going between the said cars in passing from one side to the other in said public highway; that he was then and there a youth under the age of 14 years, and without knowledge of the probable danger that would accrue to him in crossing said railroad at said public crossing, and it reasonably appeared to him that the most convenient and safe manner of crossing said

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railroad at said crossing would be for him to crawl over the drawhead of the cars that stood immediately over said railroad track, and plaintiff avers that at said time and place when defendant knew or by the exercise of ordinary care should have known that the general public and a large number of people were crossing the railroad track by crawling over or under or going between said cars as they had done for a number of years prior thereto whenever at said place said crossing was so blocked and when defendant knew or by the exercise of reasonable care should have known that this plaintiff was crossing said railroad by crawling over the drawhead on the said car standing over the said crossing, and with such knowledge the defendant's agents and servants, without keeping a proper lookout, willfully, wantonly, and negligently failed to blow the whistle or ring the bell while moving through or moving within said village, and willfully, wantonly, and negligently backed said engine against said train of cars and with reckless disregard of the peril of this plaintiff and such others of the general public as might then and there at said time and at said public highway be crossing from one side of said railroad crossing to the other, so willfully, wantonly, and negligently operated said train as to mash, disfigure, and permanently injure plaintiff's foot, and plaintiff avers that defendant's agents and servants who were in control of and operating said train then and there knew and were presently conscious of the fact that it was probable and likely that some person or persons, the general public, were then and there exposed to peril at said public highway, and were conscious of the fact that they were omitting to take unusual and proper precaution to avoid injuring said person, and with full consciousness of said fact

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as aforesaid ran said train against the foot of this plaintiff so that the same was mashed, etc.

Count 9 is similar to count 7.

Plea 2 is that the counts and all of them aver and show that, at the time said plaintiff received the hurts and injuries and damages for the recovery of which this suit is brought, he was a trespasser on the train of defendant and was guilty of contributory negligence in this: That, while the freight train was standing at said crossing, said plaintiff attempted to climb between two of the cars of said train, and, while so attempting to climb between said two cars, the same began to move and said plaintiff was injured, and defendant avers that said contributory negligence on the part of plaintiff proximately contributed to the injuries or to his receiving same.

(3) The plaintiff at the time of the injury complained of was about the age of 14 years and was a boy of experience and understanding for one of his age, and that he had lived on or near a railroad for many years, and knew about the running of the train, and knew of the danger incident to the moving and running of train, and knew that it was dangerous to go under the trains that were moving or in operation, and knew that it was dangerous to attempt to go under or cross over or between cars in or connected with a train which was liable to move, and knew that it was dangerous to get under or try to climb or crawl over the bumpers of cars (that is, between the cars of the train when said train was moving or liable to move at any time), and that notwithstanding this the plaintiff did, while the train was standing at Hatchechubbee with steam up and liable to move at any time, attempt to climb between two of the cars of said train, over the bumpers or couplings between two of the cars of the said train, and while at-

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tempting to do so said train began to move, and the fact is said plaintiff was caught between said couplings or bumpers as alleged in the complaint, and defendant says that such conduct on the part of plaintiff was negligence on his part which proximately contributed to his injuries.

Plea 4 is practically the same with some elaboration.

G. L. COMER, for appellant. The demurrers went to each count of the complaint, and should have been sustained.—*E. T. V. & G. Ry. Co. v. King*, 81 Ala. 177; *Same v. Kornegay*, 92 Ala. 228; *Nave v. A. G. S. R. R. Co.*, 96 Ala. 264; *W. of Ala. v. Mutch*, 97 Ala. 194; *Chewning v. Ensley Ry. Co.*, 100 Ala. 493; *L. & N. v. Mitchell*, 134 Ala. 261; *B. R. L. & P. Co. v. Bynum*, 139 Ala. 389; *Birmingham So. Ry. Co. v. Kendrick*, 155 Ala. 352; *McElvane v. C. of Ga. Ry. Co.*, 170 Ala. 525; *Westbrook v. K. C. M. & B.*, 170 Ala. 574; *Southern Ry. Co. v. Bennesfield*, 172 Ala. 594; 17 South. 253; 93 Mo. 543; 22 L. R. A. (N. S.) 725; 86 Ga. 192; 79 Amer. Dec. 374; 17 Amer. Rep. 521; 112 Ind. 592; 96 Mo. 99. The court erred in sustaining demurrers to plea 2 filed by appellant.—*Mobile L. & R. Co. v. Baker*, 158 Ala. 491; *L. & N. v. Smith*, 163 Ala. 141; *Ala. S. & W. Co. v. Tallant*, 165 Ala. 521; *South. Ry. Co. v. Harrington*, 166 Ala. 630; and authorities supra. Appellant's pleas 3 and 4 were good pleas as answers to counts 7 and 9.—*L. & N. v. Mitchell*, supra; *B. R. L. & P. Co. v. Brown*, 150 Ala. 327; *Duncan v. St. L. & S. F. R. R. Co.*, 152 Ala. 118; *Martin v. U. S. & N. Ry. Co.*, 163 Ala. 215; *Adams v. So. Ry. Co.*, 166 Ala. 449. Counsel discusses the assignments of error relative to the admission and exclusion of evidence, but without citation of authority. Charge 2 requested by appellant should have been given.—*So. Ry. Co. v. Stewart*, 153 Ala. 133; s. c. 164

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Ala. 171. This same argument applies with equal force to charges 3, 4 and 5 requested by appellant. Charge 6 should have been given.—*M. & C. R. R. Co. v. Copeland*, 61 Ala. 376; *L. & N. v. Webb*, 69 Ala. 106; *C. of Ga. v. Letcher*, 90 Ala. 185; *Glass v. M. & C. R. R. Co.*, 94 Ala. 581; *Chewning v. Ensley Ry. Co.*, *supra*; *C. of Ga. v. Hyatt*, 151 Ala. 355; *B. & A. Ry. Co. v. Mattison*, 166 Ala. 602. The court erred in refusing the affirmative charge as to counts 1 to 5, inclusive.—*City Del. Co. v. Henry*, 139 Ala. 161; *C. of Ga. v. Freeman*, 140 Ala. 581; *So. Ry. Co. v. Yancey*, 141 Ala. 246; *B. R. L. & P. Co. v. Randle*, 149 Ala. 539; *Same v. Hayes*, 153 Ala. 178; *Bessemer C. L. Co. v. Doak*, 152 Ala. 166; *Freeman v. Central of Ga.*, 154 Ala. 619.

GLENN & DE GRAFFENRIED, and S. B. HATCHER, for appellee. The counts averred that plaintiff was under fourteen years of age, and therefore, *prima facie* incapable of contributory negligence, and no error was committed in sustaining demurrer to pleas setting up contributory negligence.—*Tutwiler C. & C. Co. v. Enslen*, 129 Ala. 345; *B. R. L. & P. v. Jones*, 146 Ala. 277; *Same v. Landrum*, 153 Ala. 192; *B. & A. Ry. Co. v. Mattison*, 166 Ala. 602; *So. Ry. v. Shipp*, 169 Ala. 327. Each count averred that plaintiff was injured at a public crossing in a village, and the court was not in error in overruling demurrers predicated on the grounds that defendant did not owe plaintiff any duty.—Secs. 5473, 5476, Code 1907; *So. Ry. v. Shipp*, *supra*. The court did not err in overruling demurrers based upon the theory that plaintiff was a trespasser.—*H. A. & B. v. Robinson*, 124 Ala. 113; *So. Ry. v. Crenshaw*, 136 Ala. 573; *C. of Ga. v. State*, 145 Ala. 99; sec. 7733, Code 1907; *Westbrook v. K. C. M. & B.*, 170 Ala. 574; 33 Cyc. 931, and cases cited. The only proper pleading to a

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count in willfulness or wantonness is a general traverse.—*L. & N. v. Perkins*, 152 Ala. 133. The pleas failed to state facts sufficient to show or overcome the prima facie presumption that plaintiff was incapable of contributory negligence.—Authorities supra. Counts 7 and 9 charged willful or wanton negligence.—*So. Ry. v. Forrester*, 158 Ala. 477; *Same v. Weatherlow*, 153 Ala. 171; *Adams v. So. Ry.*, 166 Ala. 499; *Nave v. A. G. S.*, 96 Ala. 264; *B. R. & E. Co. v. Bowers*, 110 Ala. 328. Counsel discuss assignments of error both in the admission and exclusion of evidence, but without further citation of authority. The appellant was chargeable with wanton or willful negligence, and the court was not in error in refusing the affirmative charge as to the wanton or willful counts.—*S. & W. R. R. Co. v. Meadows*, 95 Ala. 137; *Duncan v. S. L. & S. F. R. R. Co.*, 152 Ala. 118; *So. Ry. v. Bennefield*, 172 Ala. 588. There was no error in refusing the other charges requested by appellant.—*So. Ry. v. Shipp*, supra; *L. & N. v. Anchors*, 114 Ala. 492; *So. Ry. v. Hyde*, 164 Ala. 162; *L. & N. v. Webb*, 97 Ala. 308, and authorities supra.

SAYRE, J.—The demurrers addressed severally and separately to each count of the complaint took objections, the language of which would lead to a classification as follows: (1) That on the facts alleged plaintiff was a trespasser to whom defendant owed no duty; (2) that plaintiff on his own statement of his case was guilty of contributory negligence.

Without affirming the sufficiency of the averments of the several counts in all respects, we state our conclusion that, as for any specific objection taken by the demurrer, the ruling as to each of them was free from error. To state briefly the substance of the complaint, it was that defendant, having allowed its train to stand

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across and obstruct a public road crossing in the village of Hatchechubbee for an unreasonable time, plaintiff, who was under 14 years of age, undertook to proceed along the public road by climbing over the coupling between the cars, whereupon defendant negligently moved its train, causing the bodily injuries of which plaintiff complains. In most of the counts the allegation in respect to the movement of the train, at the moment of plaintiff's injury, was that it was moved without blowing the whistle or ringing the bell or giving other warning; but, in view of the great generality of averment permitted by our system of pleading in such cases, all the counts may, for the purpose of passing upon the assigned grounds of demurrer, be taken as substantial equivalents.

Noting that there is no allegation that defendant's employees were aware of plaintiff's position in a place of danger, and hence that no question arises as to the liability of the defendant in such case, defendant's first contention, though variously stated, raises the question whether, under the circumstances, due care required defendant to take precaution against the possibility that some one might be in a position which would be rendered dangerous by the movement of its train without warning.

The language and common sense of the statute, which requires the engineer or other person having control of the running of a locomotive on any railroad to ring the bell and blow the whistle before reaching any public road crossing or stopping place, or while moving within the limits of any village, town, or city (Code, § 5473), shows that it was designed for the protection of persons who may at such places reasonably be expected to be upon the track in front of an approaching train. The additional purpose of warning passengers of the move-

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ment of trains is served by that part of the statute which requires the engineer to blow the whistle or ring the bell immediately before and at the time of leaving a station or stopping place. It was not intended for the benefit of persons who may undertake to pass between the cars or go upon the train without the privity, express or implied, of those responsible for its operation. The only duty owed to such persons is to use due care for their safety after it is discovered that they are in a position of danger.—*Carlisle v. A. G. S.*, 166 Ala. 597, 52 South. 341; *McElvane v. Central of Georgia*, 170 Ala. 525, 54 South. 489, 34 L. R. A. (N. S.) 715.

But we think the duty to give warning of some efficient sort arose in the circumstances of plaintiff's case out of the ordinary principles of due care, apart from the statute, though perhaps for practical purposes an application of the statute would serve as well. Where a public road and the line of a railroad intersect, neither the railroad company nor the public have any exclusive right of occupation. "Subject to the duty of being diligent in avoidance of probable danger (a duty which as between them is reciprocal), the public has the right to use the whole of the highway and the railroad company has the privilege of operating its trains."—*So. Ry. v. Crenshaw*, 136 Ala. 573, 34 South. 913. A railroad company may allow its train to stand across a public highway for such length of time as is necessary to the transaction of its business in a reasonable manner and with diligence. And the danger of a passage through, over, or under a train coupled up and ready for movement, though such passage be possible for the pedestrian, is so obvious, and the inconvenience to both the railroad company and the pedestrian so great, that the right of the former to occupy the highway for a reasonable time must, apart from mere theory, be consider-

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ed as exclusive. But it has no right to occupy otherwise or to protract its occupancy beyond a reasonable time, and the willful obstruction of a public highway by placing a train of cars across it and allowing such obstruction to remain there an unreasonable length of time is a violation of the criminal statute.—*Central of Georgia v. State*, 145 Ala. 99, 40 South. 991; *Gude v. State*, 76 Ala. 100. Judge Thompson's view is that: "If the train is lawfully obstructing the crossing (that is to say, if it has not obstructed it for a greater length of time than that prescribed by statute or ordinance or, in the absence of statute or ordinance, for an unreasonable length of time), then a pedestrian who attempts to continue his journey upon the highway, by climbing over or between the cars, does so at his own risk. The railway company is under no obligations to keep a special lookout for him or to take special pains to provide for his safety; but his position is substantially that of a trespasser upon its property and is not different, in law, from what it would be if the train were not obstructing a highway crossing. But after the train has obstructed the crossing beyond the length of time prescribed by statute or ordinance, or beyond a reasonable time in the absence of statute or ordinance, then the railway company is guilty of an unlawful obstruction of the highway, which is an indictable nuisance; the right of passage on the part of the public is restored; and, if pedestrians undertake to exercise that right by climbing over the obstructing train, the railroad company must see to it that it does not kill or injure them while so doing by an affirmative act of its own, namely, by starting forward its train without giving them any warning of its purpose so to do, or without looking out for their safety in any way."—2 Thompson, Neg. § 1674. The reason and justice of this view commend

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themselves to our minds; it is not at variance with any rule of our decided cases; and we adopt it as the law of this case. The pedestrian of discreet years who undertakes to go through a train unlawfully obstructing a public road may fail thereby in the observance of that due care for his own safety which the law requires of every such one, and doubtless the court will always so declare, in the absence of special circumstances modifying the general meaning of such a situation; but it does not necessarily result that he is a trespasser. He is no more a trespasser than the pedestrian who negligently walks into a hole negligently left in the street of a city. It cannot be said, as matter of unbending law, that he should either abandon his journey along the public highway or wait indefinitely upon the pleasure of the railroad company.—*Phillips v. Railroad Co.*, 80 Hun. (N. Y.) 404, 30 N. E. 333.

Nor do we conceive that our conclusion is opposed by unanimity of judicial opinion in other jurisdiction; at least it is not opposed in principle, though in a number of cases the language used may vary, for otherwise there can be no rational accounting for those numerous cases in which children of tender years, and occasionally adults, have been allowed to recover.—*Golden v. Railroad Co.*, 187 Pa. 635, 41 Atl. 302; *Railroad Co. v. Mackey*, 53 Ohio St. 370, 41 N. E. 980, 29 L. R. A. 757, 53 Am. St. Rep. 641; *Phillips v. Railroad Co.*, *supra*; *Littlejohn v. Railroad Co.*, 49 S. C. 12, 26 S. F. 967; *Gesas v. Oregon Short Line*, 33 Utah, 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074; 33 Cyc. 932, note. We find nothing in our cases of *M. & C. R. R. Co. v. Cope-land*, 61 Ala. 376, and *Pannell v. Railroad Co.*, 97 Ala. 298, 12 South. 236, in conflict with what has been said. No question of unreasonable delay in the movement of trains was raised in those cases, and in the first named

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the court stated that a failure to sound the whistle or ring the bell fixed the charge of negligence on the railroad corporation. It, however, treated the duty to warn as one imposed by the statute.

"A child, as well as an adult, may be a trespasser; and ordinarily a railroad company is under no more obligation to keep a lookout for children who, without enticement for which it is responsible, may go on the track at a place where they have no right to be than to look out for adults."—*Southern Ry. Co. v. Forrister*, 158 Ala. 482, 48 South. 71. But children have the same rights in the highway as adults (*Government St. R. R. v. Hanlon*, 53 Ala. 70), and prima facie judgment and discretion is not presumed of a child under 14 years of age.—*B. & A. Ry. Co. v. Mattison*, 166 Ala. 602, 52 South. 49; *Birmingham Ry. v. Landrum*, 153 Ala. 192, 45 South. 198, 127 Am. St. Rep. 25.

We find that there was no error in the rulings on the demurrer to the complaint.

On the authority of the last-cited case, defendant's plea 2, setting up contributory negligence in a way, without taking issue as to his age, was bad. But the presumption of mental incompetency, though plaintiff was under 14 years of age, provided he was over 7, was rebuttable (authorities last cited), and defendant undertook to set up the defense of contributory negligence in other pleas of later filing. Demurrers to pleas of this character, numbered 3 and 4, were sustained on the theory that counts 7 and 9 of the complaint stated a case of willful or wanton injury. This was error. In the counts referred to, the pleader used language from which it may be inferred that his purpose was to state his case according to the trial court's acceptance of it. But he failed adequately to do so. These counts were repugnant in themselves and failed to observe the dis-

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inction between willful wrong and that wantonness which is the equivalent of intentional wrong, on one hand, and mere negligence or inadvertence, implying the absence of mental action in respect to the thing done, on the other. But that point was not taken, and these counts should have been treated as counts in simple negligence authorizing the recovery of compensatory damages only. They did not state a case of wanton or willful injury, authorizing the assessment of punitive damages to which plaintiff's contributory negligence would have been no answer. The pleader might have stated his cause of action in a very general way, alleging that the defendant's agents in charge of the train willfully or wantonly caused his injury, and the means adopted in producing that result. Electing to aver the particulars of the alleged wantonness or willfulness, to state the *quo modo* of its exhibition, he failed to aver facts involving the inference that the act charged was done with the necessary then present consciousness that, under the conditions known to exist at the time, to wit, that persons were passing over, through, or under the train, it would probably result in disaster.—*L. & N. v. Sharp*, 171 Ala. 212, 55 South. 139; *Adams v. So. Ry. Co.*, 166 Ala. 449, 51 South. 987. The allegation is, not categorically that defendant's agents knew, but alternatively that they knew, or (count 7) by the exercise of ordinary care should have known, or (count 9) by the exercise of reasonable care would have known, that persons were crawling over or under or going between the cars. A failure to take precaution against a mere possibility, or even a probability, that persons would put themselves in a position which would be rendered dangerous by a movement of the train, in the absence of knowledge that some such condition then actually existed, cannot be tortured into anything more offensive

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to law or morals than simple negligence. There was error, therefore, in sustaining the demurrers to these pleas as answers to those counts on the ground assigned.

That the court's construction of counts 7 and 9, in connection with the rulings on the pleas, was prejudicial to defendant not only must be inferred in the absence of an affirmative showing to the contrary but it is made highly probable in fact by indications afforded by the record. These counts proceeded for willful, wanton, and reckless conduct on the part of defendant. In submitting the case to the jury, the court, stating that it had no recollection of any evidence tending to show that plaintiff's injury resulted from "willful or intentional negligence," gave in charge the law of wantonness. Although, as we have written, counts 7 and 9 stated nothing more than simple negligence, and although, if his effort to allege willful, wanton, and reckless conduct conjunctively had been immune to demurrer he could not have recovered on proof of wantonness only (*Southern Ry. Co. v. Stewart*, 179 Ala. 304, 60 South. 927, where many of our cases on this subject are collated), yet the issue of wantonness was submitted to the jury, with the statement, correct of course in the abstract, that contributory negligence is no answer to a charge of willful or wanton injury; and, considering the amount of the damages assessed in connection with the extent of plaintiff's injuries, it seems highly probable that punitive damages were awarded under those counts without regard to whether plaintiff had contributed to his injury by his own negligence. It may be also that, if these counts had been otherwise construed, the court would have granted a new trial on the ground that the damages were excessive. In saying this much we do not intend to intimate that plaintiff had no case for compensation as for simple negligence under the evidence.

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That was and will be a question for the jury on another trial on issues properly framed.

The rulings on the evidence show no reversible error. We do not appreciate the materiality or the relevancy of those matters to which defendant excepted but are unable to see how they could have affected the jury's finding.

For the error shown, the judgment will be reversed, and the cause remanded for another trial.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Damage for Failure to Deliver Freight.

(Decided April 17, 1913. Rehearing denied June 5, 1913.
62 South. 698.)

1. *Carriers; Freight; Connecting Carrier; Initial Carrier.*—An initial carrier is not liable as a carrier of an interstate shipment over the lines of a connecting carrier, where the goods were held at their point of destination by the connecting carrier after a reasonable time for their removal subsequent to the mailing of notice of their arrival as required by section 6137, Code 1907.

2. *Same.*—The provisions of U. S. Comp. St. 1911, p. 1307, do not make the initial carrier liable for any loss caused by a connecting carrier, where the connecting carrier's liability as a carrier had ceased.

3. *Same; Loss or Injury; Nature of Liability.*—Under the common law a carrier was liable as an insurer from the time he received the goods until he delivered them to the consignee, or his liability as carrier terminated under the law, except for losses occasioned by the owner or the acts of God or the public enemy.

4. *Same; As Warehouseman; Duty.*—Where a common carrier has no warehouse at the point of destination, after its duties as a carrier are at an end it may relieve itself from further liability by delivering the goods to a responsible warehouseman for or on account of the owner or consignee.

5. *Same.*—After a carrier's liability as a carrier has been terminated, the carrier is liable only as a warehouseman.

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APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by W. C. Brewer against the Louisville & Nashville Railroad Company, for damages for failure to deliver freight. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plea 2 is: "That defendant's line of railway runs from Nashville, Tenn., to Montgomery, Ala., and that it has no line of railway running from Montgomery, Ala., to Tuskegee, Ala., but that a line of railway known as the Western Railway of Alabama, at said time mentioned in complaint, ran from Montgomery to Tuskegee, Ala., and defendant delivered said goods to said Western Railway in Montgomery within a reasonable time after same were received by it at Nashville; that said goods at the time of said delivery by it were in the same condition as when they were received by defendant at Nashville; that said Western Railway, within a reasonable time after delivery to it, safely carried said goods to Tuskegee, and deposited or stored same in a depot or warehouse maintained and operated by it at Tuskegee for the purpose of storing freight and goods; that at the time of the arrival of said goods at Tuskegee, and continuously since said Tuskegee was a city or town having daily mail, and that within 24 hours after the arrival of said goods at Tuskegee, notice of the said arrival of said goods was given to plaintiff by mail, which notice was properly addressed to him at Tuskegee and the postage thereon prepaid; that said goods remained in the possession of said Western Railway at its said depot in Tuskegee unclaimed for more than 60 days after their arrival and after notice; and that said goods were thereafter sold by said Western Railway at public outcry, at its freight house in Montgomery, Ala., to the highest bidder for cash, after notice, indicating

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the nature of the package in which said goods were contained, the consignee, and the time and place of said sale, had been given for three weeks by publication once a week in the Montgomery Advertiser, a newspaper published at said place of sale, and that said goods were, upon the sale thereof to the highest bidder, delivered to said highest bidder as the purchaser thereof at said sale, and that neither the owner nor consignee of said goods resided at Tuskegee, Ala., at said time."

TILLMAN, BRADLEY & MORROW, and M. M. BALDWIN, for appellant. The court erred in sustaining demurrers to plea 2.—Sec. 6137, Code 1907; *Kennedy Bros. v. M. & G. R. R. Co.*, 74 Ala. 430; *Bowdoin v. A. C. L. Ry.*, 148 Ala. 29; *So. Ry. v. Aldridge, et al.*, 142 Ala. 368; *L. & N. v. Touart*, 97 Ala. 514; sec. 6139, Code 1907. The appellant was not liable under the facts in this case under what is known as the Carmack amendment found in the 1911 supplement U. S. Comp. St. p. 1307.—*C. of Ga. v. Sims*, 169 Ala. 300; 63 S. E. 415; 137 S. W. 721; 119 S. W. 354; 117 S. W. 517; 137 S. W. 721. If either defense set up by the plea is good, the plea is good.—*W. U. v. Sanders*, 164 Ala. 241. It cannot be contended that the sustaining of the demurrers to the plea was harmless.—*N. C. & St. L. v. Parker*, 123 Ala. 683. The liability sought is a common law liability, and delivery must be made to the consignee or his authorized agent, and a delivery to any other person would make the railroad liable.—*S. & N. v. Wood*, 66 Ala. 167; *Colins v. A. G. S.*, 104 Ala. 390. Notice was essential to terminate the liability of the carrier, and it was further necessary to plead and show notice, and a reasonable time after notice, and the fact that appellee did not call for the goods within such time.—*C. of Ga. v. Burton*, 165 Ala. 425; *So. Ry. v. Adams Mach. Co.*, 165 Ala.

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436. The same argument applies to plea 3. Under the issues as framed, it was the duty of appellee to demand the goods at the point of destination.—*L. & N. v. Meyer*, 87 Ala. 597; *L. & N. v. McGuire*, 79 Ala. 399. The answer to the fourth interrogatory propounded to appellee by appellant should not have been excluded.—*B. R. L. & P. Co. v. Oden*, 164 Ala.; *B. R. L. & P. Co. v. Morris*, 163 Ala. 190; *Sullivan T. Co. v. L. & N.*, 163 Ala. 125; *Goodwater W. Co. v. Street*, 137 Ala. 621. Counsel discuss the question of damages with citation of authority, but in view of the opinion it is not deemed necessary to here set it out.

DENSON & DENSON, and WEIL, STAKELY & VARDAMAN, for appellee. Plea 2 sets up no defense that was not available under the general issue, and hence, any error in sustaining demurrers to it was without injury.—*Hamrick v. Andrews*, 9 Port. 9; *Fail v. McArthur*, 31 Ala. 26; *Kennedy v. Lambert*, 37 Ala. 57; *Phoenix I. Co. v. Moog*, 78 Ala. 284; *L. & N. v. Allgood*, 113 Ala. 163; *Beall v. Folmar*, 122 Ala. 414; *L. & N. v. McCool*, 167 Ala. 644. The defense that a carrier's liability as a common carrier had ceased, and that it holds the goods as warehouseman is available under the general issue.—*Collins v. A. G. S.*, 104 Ala. 390; *Frederick v. L. & N.*, 133 Ala. 486; *Kennedy v. M. & G. R. R. Co.*, 74 Ala. 430. As to when the liability of common carrier terminates, and that of warehouseman begins counsel cite.—*Bowdoin v. A. C. L. R. R. Co.*, 148 Ala. 29. In any event, the plea was insufficient as a defense to defendant in the capacity as a warehouseman because it failed to aver sufficient notice under section 6139, Code 1907.—Authorities supra.

DE GRAFFENRIED, J.—This suit was brought by the plaintiff, W. C. Brewer, against the defendant, the

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Louisville & Nashville Railroad Company, to recover damages for the failure by the defendant to deliver to the plaintiff certain personal property which the plaintiff delivered to the defendant at Nashville, Tenn., and which the defendant undertook for a reward, as a common carrier, to transport and deliver to the plaintiff at Tuskegee, Ala. The complaint contains but one count, and that count is in code form.

We direct attention to the fact that the suit is for a failure to deliver, and not for delay in delivering, the goods, that the suit is against the defendant as a *common carrier*, and that the complaint counts upon the failure of the defendant to perform a *carrier duty*, and is for the enforcement of a *carrier liability*. Under the pleadings in this case the defendant's contract of carriage bound it to the same strict performance of its duties to the plaintiff as the common law places upon a common carrier of freight. It is not claimed that the goods were destroyed through the fault of the plaintiff, by an act of God or of the public enemy, and the defendant was, so long as the relation of common carrier existed between it and the plaintiff, an insurer of the freight.

The defendant's line of railway does not extend from Nashville, Tenn., to Tuskegee, Ala., but only from Nashville, Tenn., to Montgomery, Ala. When the freight reached Montgomery it was then delivered by the defendant to the Western Railway of Alabama, to be by it transported from Montgomery to Tuskegee, and there, by the Western Railway, to be delivered to the plaintiff.

Plea 2, which the reporter will set out, sets up a state of facts which, if true, relieved the defendant of its duties to the plaintiff, as a common carrier, and before the sale of the books for storage and freight charges

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placed the books in the hands of the Western Railway of Alabama as a warehouseman.—*Norfolk & Western Ry. Co. v. Stuart's Draft Milling Co.*, 109 Va. 184, 63 S. E. 415; *Ala. & Tenn. Rivers Co. v. Kidd*, 35 Ala. 209; *Kennedy Bros. v. M. & G. R. R. Co.*, 74 Ala. 430; Code of 1907, § 6137.

We find nothing in the Carmack amendment to the act of Congress known as the "Hepburn Bill" (Act June 29, 1906, c. 3591, 34 Stat. 593, § 7, pars. 11, 12 [U. S. Comp. St. Supp. 1911, p. 1307]) which in any way conflicts with the above views.—*Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co.*, *supra*; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed.—.

In the above-cited case of *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, this court, announcing a well defined and recognized common-law doctrine, said: "If goods, transported by railroad, are not called for by the consignee when they arrive at their destination, and are then deposited in the warehouse of the company without additional charge, until the owner has a reasonable time, by the exercise of proper diligence, to remove them, the liability of the carrier, as a carrier, is at an end; and if after this the goods remain in their warehouse, they are responsible only as keepers for hire. * * * If they in fact keep no such warehouse at the point to which goods consigned to the owner or a third person are sent, it seems that the duty of the company is performed and their responsibility at an end, if, after carrying the goods to the place of destination, and keeping them safely for such a length of time as to afford the owner an opportunity, by the use of due diligence, to remove them, they deposit them in the warehouse of a responsible person, for and on account of the owner or consignee."

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Of course if a common carrier of freight has no warehouse at the point of destination of freight, and it safely keeps such freight until its *carrier duties are at an end*, and the consignee fails to call for and get such freight, and it then deposits the freight in the warehouse of "a responsible person for and on account of the owner or consignee," its duties to the consignee with reference to the freight are at an end, and if after that time the consignee brings a suit against such carrier for a failure to deliver such freight, the carrier may show that it has performed its duties to the consignee by showing that it has delivered the freight to a responsible warehouseman for account of such consignee.—*Norfolk & Western Ry. Co. v. Stuart's Draft Milling Company, supra.*

In the case of *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, the Supreme Court of the United States was called upon to pass upon the constitutionality of, and to construe, the Carmack amendment to the Hepburn bill, and in the opinion in that case the court says: "The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce, and 'receiving property for transportation from a point in one state to a point in another state,' as having contracted for *through carriage* to the point of destination, using the lines of connecting carriers as its agents." In this case the court further says: "The English cases beginning with *Muschamp v. Lancaster Railway Company*, 8 M. & M. 421, decided in 1841, down to *Bristol, etc., Railway v. Collins*, 7 H. L. Cases, 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through trans-

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portation, and an assumption of full *carrier* liability by the primary carrier. The ruling is grounded upon considerations of public policy and public convenience, and classes the receipt of the goods so designated for a point beyond the carrier line as a holding out to the public that the carrier has made its own arrangements for the continuance by a connecting carrier of the transportation after the goods leave its own line."

At common law a common carrier was an insurer of freight, except against damage or loss occasioned by the plaintiff or owner of the freight, by an act of God or the public enemy, from the time he received the freight as such common carrier until he delivered it to the consignee at the point of destination, or until, under the law, his carrier liability terminated. From that time on until delivery, if he retained possession of the freight, he was liable only as a warehouseman. If he had no warehouse at the point of destination, then when the time arrived for his carrier liability to terminate, he absolved himself from all liability on account of such freight, provided he deposited the freight in the warehouse of a responsible person for and on account of the consignee. The principal trouble was that the initial carrier frequently undertook the carriage of freight, through the medium of other independent carriers, beyond the terminus of its own line, and many of the American courts committed themselves to the doctrine—and upon common-law principles upheld contracts providing—that "each carrier shall be liable only for loss or damage occurring on its own line. * * * As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did con-

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tinue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information when and where his property had been lost or damaged, and had no access to the records of the connecting carrier, who in turn had participated in some part of the transportation, he was compelled, in many instances to make such settlement as should be proposed."—*Atlantic Coast Line v. Riverside Mills, supra*.

In the case of *Adams Express Company v. Croninger, supra*, the Supreme Court of the United States, referring to the Carmack amendment, said: The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common-law duty as a common carrier.

We have quoted extensively from the two cases last cited for the purpose of illustrating our views that in said cases the Supreme Court of the United States has declared that under the Carmack amendment all interstate shipments are covered and controlled by the above-quoted English rule regardless of the stipulations contained in bills of lading evidencing the shipments, and that the true effect of said amendment is to bring all interstate shipments, the stipulations of bills of lading to the contrary notwithstanding, under the operation of that rule.

Whether section 6137 of the Code of 1907 has or has not applicability to *interstate* shipments it is not necessary for us to determine. On that subject, however,

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we refer to the following cases:—*Adams Express Co. v. Croninger, supra*; *St. L. & S. F. R. R. v. Keller*, 90 Ark. 308, 119 S. W. 254; *St. L., I. M. & S. v. Furlow*, 89 Ark. 404, 117 S. W. 517; *Patton v. T. & P. Ry. Co.* (Tex. Civ. App.) 137 S. W. 721.

As it seems to be the policy of the "courts of the United States, in dealing with interstate commerce transactions having their seat within a state, to apply the general principles of the common law of that state (as they understand it), so far as the point presented has not been settled by statute" (Baldwin's American Railway Law, p. 384, subd. 9; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765), it seems to us that, under the very language of the above-cited opinions of the Supreme Court of the United States, plea 2 brings this case clearly out of the operation of the Carmack amendment, and constituted a complete answer to the plaintiff's complaint (*Kidd's Case*, 35 Ala. 209). The plea alleges that notice of the arrival of the freight at Tuskegee was, within 24 hours after its arrival at that point, mailed to the consignee at Tuskegee, properly stamped and addressed to him at that point, and that the freight remained in the depot of the Western Railway at that point *unclaimed for more than 60 days* after its arrival at that point. The plea shows that the defendant had no warehouse at Tuskegee, and shows, therefore, under all of our decisions, a proper and legal ending of defendant's carrier liability to the plaintiff. This suit was for a breach by the defendant of a *carrier* duty, and when that carrier duty came to an end, the Western Railway Company became the warehouseman of the plaintiff, and the defendant's liability under its contract with plaintiff was as fully performed as if defendant had, through an agent, gone to Tuskegee, taken the goods from the Western Railway

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Company's depot, and placed them, for and on account of the plaintiff, in some other responsible warehouse. If *that* had been done, we do not think that it would be seriously contended that defendant could be held liable in this action.—*Norfolk & Western Ry. Co. v. Stuart's Draft Milling Co., supra; Kidd's Case, supra.*

In the above discussion we have treated as facts the allegations of fact contained in plea 2. The demurrer, of course, admits the facts set up as true. It seems, therefore, that the court committed an error in sustaining the plaintiff's demurrer to plea 2; and, as that plea was not duplicated by any other plea upon which the case was tried, this case must be reversed because of this erroneous ruling of the court.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Injury to Passenger.

(Decided May 15, 1913. 62 South. 500.)

1. *Carriers; Passengers; Injuries; Complaint.*—The complaint examined and held that each count thereof on which the case was tried sufficiently alleged negligence.

2. *Payment; Plea of; Unliquidated Damages.*—Payment is a mode of extinguishing a debt, and hence, a plea of payment is not a good defense to an action upon an unliquidated demand for personal injury.

3. *Same; By Check; Presumption.*—Ordinarily it is not presumed that a check is taken in payment of a claim, but an agreement that it be accepted as payment will be effectuated.

4. *Pleading; Plea Darrein Continuance.*—Where the action was for injuries, a plea that defendant had compromised and settled all claims and had taken plaintiff's written release as set out in the plea, was not strictly a plea *pais darrein continuance*, but under the practice in this state operated in the same manner as pleas of defense occurring since the last adjournment, and it was not necessary that such plea aver payment of cost already accrued.

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5. *Accord and Satisfaction; Part Payment.*—Where the claim sued on is disputed, an agreement of compromise accompanied by payment of a sum less than that claimed operates as an accord and satisfaction; the concession made by the one being a sufficient consideration for the concession made by the other without any release, receipt or discharge in writing.

6. *Same; Pleading.*—A replication alleging that an attorney's lien existed when an agreement of compromise was made, is not an answer to a plea of accord and satisfaction by reason of the compromise agreement.

7. *Constitutional Law; Determination; Demurrer.*—The constitutionality of section 3011, Code 1907, cannot be raised by demurrer to pleas.

8. *Attorney and Client; Lien; Protection Against Settlement.*—Neither a party nor his attorney should be heard to say that an agreement of compromise between the parties to the suit was made in actual or legal fraud of the right of the attorney to a lien: at least the attorney should be required to show by petition or motion in his own name his right to proceed with the suit notwithstanding the agreement of compromise, as the courts are not bound to inquire whether the attorney would be satisfied with the compromise.

9. *Compromise and Settlement; Pleading; Fraud.*—Where the action was for injury to a passenger and the defense was compromise and settlement, a replication alleging that the settlement as executed by plaintiff was obtained by fraud in that plaintiff was in a weak mental and physical condition at the time, and was in ignorance of the extent and consequences of her injury, and incapable of appreciating their extent, and at the time had no legal advice or the advice of anyone else, knowing the extent of her injuries, or of the company's liability, and that the company's physician knowing of such facts and having plaintiff's confidence falsely represented to her that there was nothing serious the matter with her, for the fraudulent purpose of securing the settlement for a grossly inadequate sum, and that plaintiff on the same day repudiated the settlement, was not subject to the demurrers interposed.

10. *Release; Consideration.*—A release from liability for damages for personal injury must be supported by a valuable consideration.

APPEAL from Lee Law and Equity Court.

Heard before Hon. LUM DUKE.

Action by Nancy R. Foshee against the Western Railway of Alabama. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The following are the counts of the complaint referred to:

"(4) Plaintiff claims of defendant \$25,000 as damages for that heretofore, to wit, October 20, 1911, defendant

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was a common carrier of passengers by means of a train upon a railroad running from Opelika to Millstead, Ala., and plaintiff's fare had been paid to defendant for being carried by defendant on said train from Opelika to Millstead, and plaintiff was on said train as defendant's passenger on the occasion aforesaid to be carried by defendant as aforesaid, and while plaintiff was on said train as defendant's passenger on the occasion aforesaid, and said train was in or near said Opelika, that car provided by defendant for the carriage of passengers upon which plaintiff rightfully was in said train as such passenger was suddenly or violently jarred or jolted so that as a proximate consequence thereof plaintiff was thrown or caused to fall, and (here follows a catalogue of her injuries). Plaintiff avers that defendant was guilty of negligence in or about carrying plaintiff as its passenger on the occasion aforesaid, and that as a proximate consequence of said negligence said car on which plaintiff was on the occasion aforesaid was suddenly and violently jarred or jolted on said occasion, and plaintiff suffered said consequent injuries and damages."

Count 5. Same as 4 down to and through catalogue of injuries with the additional allegation; plaintiff further avers that defendant's servants or agents, acting within the line and scope of his authority as such, wantonly or intentionally caused plaintiff to suffer said injuries and damages by wantonly or intentionally causing said car on which plaintiff was to be suddenly and violently jarred or jolted on said occasion, well knowing that so to do would likely or probably cause some passenger to suffer great personal injury and damages.

Plea 1 was the general issue.

Plea 2 payment.

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"(3) That defendant had compromised and settled any and all claims which plaintiff had against the defendant for alleged injury for a valuable consideration and took her written release therefor in words and figures as follows: 'Alexander City, March 22, 1912. To whom it may concern: I, Mrs. Nancy R. Foshee, being a passenger on a train of the Western Railway of Alabama on October 20, 1911, and receiving certain bodily injuries which I hold makes the said Western Railway of Alabama liable to me for said injuries, which fact is denied by the said Western Railway of Alabama, and whereas, both parties desire to settle the question of damages, I, Mrs. Nancy R. Foshee, do hereby agree to accept the sum of \$300 to me in hand paid and the receipt of which I hereby acknowledge, and same is to be in full for all damages which I receive both now and hereafter, and I hereby quitclaim and release the said Western Railway of Alabama from all liability for my injuries for the sum of \$300.' Signed by Mrs. Nancy R. Foshee and witnessed by H. L. Foshee and A. H. Hollowell."

Plea 4 is the plea of payment, not only as to the debt and demand, but as to the cost which had accrued in the court.

(5) Same as 3, with the addition that it is alleged that all costs accrued had been paid.

(6) Plea of payment of all damages and costs.

(7) That defendant gave and plaintiff received and accepted a check for \$300 in satisfaction of the cause of action.

(8) Same as 7, with the additional averment as to payment of cost.

(9) Same as 3, with a little elaboration as to detail and an additional averment as to payment of cost.

The following are the replications to pleas 5 and 9

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“(2) That the compromise and settlement therein referred to was obtained by fraud in this: Plaintiff was in weak mental and physical condition, and was then ignorant of the extent and consequences of her injuries, the subject-matter of this suit; she was incapable of knowing or appreciating the extent thereof, and was then and there without legal advice, and was absent from the attorney whom she had previously employed to advise and represent her in the assertion of her said claims against the defendant and was without the aid or counsel of any person who knew the extent of her injuries, or the extent of defendant’s liability to her for said injuries, and that one Dr. Palmer, a practicing physician, acting in behalf of defendant, and knowing or having notice of the aforesaid facts and conditions, came to plaintiff’s home and gained or had plaintiff’s confidence and told plaintiff, in or about procuring said compromise or settlement, substantially that there was nothing serious the matter with her, which was in fact false and was made for the fraudulent purpose of procuring said compromise or settlement for a grossly inadequate sum, and said Palmer thereby induced and unduly influenced plaintiff to sign said paper writing for a check for a sum grossly less than would be the fair and just compensation for plaintiff’s injury. The said check so given by Palmer was given her and accepted by her upon the statement of the said Palmer that the same would be paid upon presentation to Nolen’s Bank in Alexander City, and plaintiff caused said check to be duly presented by her agent on the next day after it was given to her, and said bank declined to pay the same, and plaintiff’s agent then and there left said check at said bank but had no authority to leave said check at said bank for collection for plaintiff, and said agent so informed said bank upon its refusal to pay same.

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Plaintiff on the same day repudiated said compromise and settlement and rescinded said release, and on that day, through her attorney at law, notified the said Palmer that she had repudiated the same and would not be further bound thereby and would not have received said check or its proceeds, and plaintiff further avers that she never has received any amount whatsoever in consideration of said settlement or compromise and has never received any amount whatever as proceeds of said check, and has not now, nor has she ever had, possession of said check since same was left in the bank for her on the day following the day same was given her by said Palmer."

"(4) That there was no valuable consideration for her signature to said paper writing, and there was no valuable consideration for said compromise and settlement."

GEORGE P. HARRISON, for appellant. The counts were subject to the demurrer interposed.—*B. R. L. & P. Co. v. Weathers*, 164 Ala. 23. Plea 2 was good.—3 Cyc. 1254b. Pleas 4, 5, 6, 7 and 8 and 3 were good, and the court erred in sustaining demurrers thereto; sections 3011, 3012, Code 1907, being unconstitutional.—*King v. Palmer*, 34 Ala. 416; *Mills v. Long*, 58 Ala. 458; *U. S. R. Co. v. Stock Co.*, 95 Ala. 322; *Stillman Co. v. Miron*, 120 Ala. 206; 27 Am. Rep. 75. Courts of law have no original jurisdiction to enforce lien.—*Enslen v. Wheeler*, 98 Ala. 200. A plea since the last continuance was a good plea.—1 Cyc. 343. The demurrer to plaintiff's replication No. 4 should have been sustained.—*Meyer v. Black*, 139 Ala. 174.

HARSH, BEDDOW & FITTS, and P. O. STEPHENS, for appellee. Demurrers were properly overruled to the fourth count, as it sufficiently alleged negligence.—*B. R. L. & P. Co. v. Jordan*, 170 Ala. 530; *Same v. Yates*

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169 Ala. 387; *Am. Bolt Co. v. Fennell*, 158 Ala. 485; *C. of Ga. v. Freeman*, 134 Ala. 354; *H. A. & B. v. Miller*, 120 Ala. 543. This is also true as to the fifth count as amended.—*Yarbrough v. Carter*, 60 South. 833; *B. R. L. & P. v. Goldstein*, 61 South. 281. A plea of payment is not a proper plea to an unliquidated demand.—30 Cyc. 1259; 22 A. & E. Enc. of Law, 517. There was no error in sustaining demurrers to the pleas.—1 Cyc. 343-6. The court might well have rested its action wholly on the idea of an unsatisfied attorney's fees.—Sec. 3011, Code 1907; 31 S. E. 88; 63 Ga. 496; 89 Ga. 411. This statute was copied verbatim from the Georgia Code after the construction contended for had been given it in the Georgia Cases cited, and our Legislature must be presumed to have intended to have adopted it with that construction.—*Barnwell v. Murrell*, 108 Ala. 377.

SAYRE, J.—Under the act creating the Lee county court of law and equity, this case was brought here for a review of the rulings on the pleadings in advance of a submission to the jury. As we read count 4 of the amended complaint, it avers negligence antedating the sudden and violent jolting or jarring of the car in which plaintiff was a passenger, a negligence which, operating through the alleged sudden jolt or jar of the car, caused plaintiff's injury. True, the negligence is averred in a most general way. It is that defendant was guilty of negligence in or about carrying plaintiff as its passenger; but that averment of negligence, in connection with a statement of the relation between the parties, has been held sufficient in cases of the sort.—*Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 South. 349; *L. & N. R. R. Co. v. Church*, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29; *B. R. L. & P. Co. v. Hagard*, 155 Ala. 343, 46 South. 519. This case

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may be differentiated from *B. R. L. & P. Co. v. Weathers*, 164 Ala. 23, 51 South. 303, on the consideration that in that case there was no effort to aver, generally or otherwise, a negligence antedating the alleged sudden jerk in the line of causation, nor was it averred that the sudden jerk was negligently caused. The complaint in that case was rested upon the bare fact that plaintiff was injured by an isolated, unrelated jerk, which was without characterization, except that it was alleged to have been sudden. This was held insufficient. Here, as we have seen, there is an averment of negligence which operated through a sudden and violent jar or jolt to plaintiff's injury. The demurrer to the count was properly overruled.

More patently count 5 was good. The averment is that defendant's servant or agent, acting within the line and scope of his authority as such, wantonly or intentionally caused plaintiff's injuries, not that he wantonly or willfully did something which might or might not have caused that result, and then the means adopted in producing the result is stated. Under our decisions this was enough.—*L. & N. R. R. Co. v. Sharp*, 171 Ala. 212, 55 South. 139.

At the trial term a plea of the general issue was filed, followed by several special pleas alleging (to speak of them in a general way) payment and accord and satisfaction. Pleas 2, 4, and 6 were pleas of payment. Payment is a mode of extinguishing a debt, and a plea of payment is not an appropriate answer to an unliquidated demand in tort such as was claimed in the complaint. There was no error in sustaining the demurrer to these pleas.

Plea 3 was a plea of accord and satisfaction. The trial court overruled demurrers to pleas 5 and 9, which set up substantially the same facts as plea 3, except that

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in addition they averred that defendant had paid costs accrued to the date of their filing. From this we infer that the trial court was of opinion that the averment as to the payment of costs was essential to the sufficiency of the proposed defense, and we infer that plea 3 with a like averment would have been held good. The dates averred in these pleas show that the alleged concord of the parties was reached subsequent to the commencement of the action, but before pleas filed. At the common law a plea since the last continuance superseded all other pleas and defenses in the cause, but by our statute a plea of that character may be pleaded along with pleas to the merits of the original action.—Code, § 5336. These pleas were not strictly pleas puis darrein continuance (*McDugald v. Rutherford*, 30 Ala. 253, and cases there cited; *Dryer v. Lewis*, 57 Ala. 551; *Lindsay v. Barnett*, 130 Ala. 417, 30 South. 395); but in our practice, where costs accrue upon the filing of the complaint and the issue of summons, in their effect upon the ultimate disposition of costs, pleas averring matters of defense which have arisen since the suit was brought, though before plea pleaded, must operate in like manner as pleas since the last adjournment or since plea pleaded.—*State ex rel. Sanche v. Webb*, 110 Ala. 214, 20 South. 462. By these pleas defendant submitted that, in the event it failed upon its plea to the original merit of the alleged cause of action, costs accrued prior to the filing of the plea should be taxed against it. But if defendant should succeed on its denial of the original merit of the asserted cause of action, the result will be that it go out of court with a judgment for its costs. It was not necessary that these pleas should aver payment of costs already accrued. Pleas 5 and 9 were good pleas as the court held, but so also was plea 3.

In legal effect pleas 7 and 8, determined according

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to the substance of their averments, were pleas of accord and satisfaction. They set up an executed agreement of compromise. They aver, in substance, that defendant gave and plaintiff accepted in satisfaction of her alleged cause of action a specified consideration. Where the claim in suit is disputed or unliquidated, an agreement of compromise, followed by the payment of a sum less than that claimed in satisfaction, operates as an accord and satisfaction. In such case the concession made by one is a sufficient consideration for the concession made by the other, nor in such case is there need for release, receipt, or discharge in writing.—*Hand Lumber Co. v. Hall*, 147 Ala. 561, 41 South. 78.

Ordinarily it is not presumed that a check is taken in payment or satisfaction of a claim; but if the parties so agree, as is alleged in plea 8, the agreement must be given effect according to the intention of the parties.—*Smith v. Elrod*, 122 Ala. 269, 24 South. 994; 30 Cyc. 1207, 1208.

One ground of demurrer taken to all the pleas of payment and of accord and satisfaction was that they failed to aver or show payment or satisfaction of the fees of plaintiff's attorneys or their lien on the pending suit for fees. Another was that they failed to show that plaintiff's attorneys of record had joined in the concord of the parties. Evidently the court resolved this question in favor of the appellant, for it overruled demurrers to pleas 5 and 9, as we have already stated, which made no mention of attorneys' fees. But, if these grounds were well taken, error could not be predicated of those rulings which sustained demurrers to those pleas of accord and satisfaction after action brought, which we have held good. If these grounds of demurrer were well taken, the demurrers to those pleas were properly sustained, notwithstanding what we have said

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of them, and appellee urges that these grounds of demurrer ought to have been accepted as reason enough for holding all the pleas insufficient.

Appellant argues the unconstitutionality of the statute (Code, § 3011), which declares that attorneys at law shall have a lien for their fees "upon suits, judgments, and decrees for money," and "shall have the same right and power over said suits, judgments, and decrees, to enforce their liens, as their clients had or may have for the amount due thereon to them." The constitutional validity of acts of this sort has been generally affirmed by the courts in states where such acts have been adopted.—*Standige v. Chicago Railway Co.*, 254 Ill. 524, 98 N. E. 963, 40 L. R. A. (N. S.) 529, and note where some of the cases are collated. We have thought it best not to enter upon a discussion of the only objection which, it occurs to us, may with plausibility be taken against the act, to wit: That it destroys the right of the parties to a suit to contract and dispose of a disputed claim according to their own concurring notions of right and justice, for the reason that we are satisfied the question cannot be raised by demurrer to pleas as plaintiff undertook to raise it in this case. The statute gives a remedy by providing that attorneys have the same right and power over suits, to enforce their liens as their clients had or may have. Appellant has suggested that the right is conferred in contravention of public policy. A sound policy might be more convincingly invoked against the remedy, for we conceive that much of difficulty and confusion will arise in the effort to have determined in one finding by a jury the respective rights of plaintiffs, their attorneys, and parties defendant. But we have nothing to do about questions of policy or convenience. That is for the Legislature. It seems, however, clear enough on general principles,

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which are unaffected by the statute, that the client, acting for himself, or the attorney acting for his client, ought not to be heard to say that an agreement of compromise into which the parties have entered was in actual or legal fraud of a right peculiar to the attorney. At least the attorney ought to be required to show by petition or motion made in his own name and behalf his right to proceed with the suit notwithstanding the agreement of the parties. And besides, while it is held that the suit is notice to the defendant of the lien of plaintiff's attorney, it does not follow that the court must take notice of the lien *ex mero*. Non constat, the attorney may have been paid. It may have been the defendant's duty to inquire whether plaintiff's attorneys would be satisfied, but no such duty can be put upon the court unless the issue be made between the parties by appropriate pleading. The lien is a fact which must be brought within the court's cognizance by an averment of fact. The court cannot assume the existence of a lien on demurrer to defendant's plea of accord and satisfaction. We think, therefore, that the several pleas were proof against those grounds of demurrer which asserted that plaintiff's attorney may have had an unsatisfied lien, and, we may add, a replication of the attorney's lien would be no answer to the defendant's plea of accord and satisfaction. As against the plaintiff, the plea is good, though the attorney be not provided for. If the rights of the attorney have been invaded, he must make the fact known to the court in a separate though subsidiary and dependent proceeding.

To pleas 5 and 9 the plaintiff filed several special replications. Demurrers to those numbered 2 and 4 were overruled, and these rulings are assigned for error.

The demurrer to replication 2 was properly overruled.—*L. & N. R. R. Co. v. Huffstutler*, 162 Ala. 619, 50

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South. 146. No sufficient reason for a holding to the contrary has been suggested to us. Many grounds of demurrer were assigned, and "special attention is asked" to a number of them, but the argument is "that the plaintiff's agent, who presented said check to the Nolen Bank, then and there had the amount thereof placed to the credit of plaintiff and received a deposit book therefor from said bank," and the argument proceeds: "An examination of this replication will show that the facts therein set forth do not negative this contention." This argument rests upon facts which are nowhere shown in the record. They were not alleged in the pleas; they were not confessed in the replication. If the demurrer had afforded ground for the argument made in its support, it would have been condemned as a speaking demurrer. It was well, therefore, to overrule the demurrer.

Replication 4 denied that there was a valuable consideration for the alleged compromise and settlement. The plea had averred the payment and acceptance of a sum of money in accord and satisfaction. The reply proposed by this replication might have been shown under the general replication which was filed. Nevertheless the replication denied a fact essential to the sufficiency of the plea and presented a complete answer in law to the plea. There was no error in overruling the demurrers.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

DOWDELL, C. J., and MCCLELLAN, J., not sitting.

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Injury to Passenger.

(Decided May 22, 1913. 62 South. 759.)

1. *Carrier; Passenger; Injury; Matters Available Under General Issue.*—Where it is alleged that the injuries were the result of negligence or of wantonness on the part of defendant or its servants or agents the fact that the injuries were due to unavoidable accident was available under the general issue because if due to unavoidable accident, it was not due to negligence or wantonness.

2. *Same; Defenses.*—A passenger's contributory negligence or assumption of risk is not a defense to counts alleging that the injuries were due to the wantonness of the carrier's agents or servants.

3. *Same; Evidence; Sufficiency.*—The evidence examined and held not sufficient to present a question for the determination of the jury as to whether the passenger's slipping was caused by a defect in the steps.

4. *Negligence; Burden of Proof.*—Where a plaintiff bases a right of recovery upon the negligence of another he must show a state of fact from which the negligence charged in his complaint may be reasonably inferred.

5. *Same; Evidence; Sufficiency.*—Where the evidence leaves it uncertain as to whether the cause of the injury was something for which defendant was responsible, or something for which it was not responsible, there is a failure of proof, and the jury cannot be permitted to guess at the real cause.

6. *Appeal and Error; Review; Matters Not Necessary to Decision.*—Technical objections to a defendant's pleading will not be considered on appeal where plaintiff's evidence falls to show such negligence on the part of defendant as will authorize a recovery.

APPEAL from Coosa Circuit Court.

Heard before Hon. A. H. ALSTON.

Action by Mrs. Bennie Mae Carlisle against the Central of Georgia Railway Company, for damages for injury to her while a passenger. Judgment for defendant and plaintiff appeals. Affirmed.

See, also, 2 Ala. App. 514; 56 South. 737.

RIDDLE, ELLIS, RIDDLE & PRUETT, and RIDDLE & BURT, for appellant. Contributory negligence must be specially

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pleaded.—*A. G. S. v. McWhorter*, 156 Ala. 269. A plea of contributory negligence or assumption of risk must state the facts constituting the contributory negligence or the assumption of risk, and if the facts stated do not, as a matter of law, and of themselves, constitute contributory negligence or assumption of risk, then it is necessary to state in the plea that the acts relied on as constituting the contributory negligence or assumption of risk were “negligently” done or omitted.—*Creola Lumber Co. v. Mills*, 149 Ala. 474; *Foley v. Pioneer Mining and Mfg. Co.*, 144 Ala. 178; 13 Am. and Eng. Enc. of Pleading and Practice, 1914. Contributory negligence or assumption of risk is no defense against a count in a complaint for a willful, wanton or intentional injury and is no defense against the entire complaint where the complaint contains a count for wanton, willful or intentional injury.—*L. & N. R. R. v. York*, 128 Ala. 304. When an injury to a passenger occurs, negligence on the part of the defendant is presumed. 2nd Mayfield, page 631, sec 24B; 6th Mayfield, page 667, sec. 12. A railroad company owes to its passengers the duty to exercise the highest degree of care, skill and diligence known to very careful, skillful and diligent persons engaged in like business to furnish for the accommodation of its passengers a coach well equipped and to keep the same in repair and in good condition.—*Elliott Railroads*, vol. 4 page 397, sec. 1587. The affirmative charge should never be given where there is evidence which authorizes a reasonable inference of facts unfavorable to the right of recovery by the party asking it.—*Peters v. Sou. Ry. Co.*, 135 Ala. 537; *White & Co. v. Farris*, 124 Ala. 470. Where from the evidence different inferences may be drawn, the general affirmative charge cannot be given.—*Englehart v. Richster*, 136 Ala. 562; *McWhorter v. Bluthenthal & Bickart*, 136 Ala 568.

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BARNES & DENSON, for appellee. Technical errors as to pleadings are not available to reverse where, under the undisputed evidence, plaintiff was not entitled to recover.—*Hill v. McBride*, 125 Ala. 542; *L. & N. v. Johnson*, 128 Ala. 634. The evidence failed to show any negligence for which defendant was responsible, and defendant was therefore entitled to the affirmative charge.—*C. of Ga. v. Carlisle*, 2 Ala. App. 514, and cases cited.

DE GRAFFENRIED, J.—Mrs. Bennie Mae Carlisle brought this suit against the Central of Georgia Railway Company for the recovery of damages which she alleges that she received in an injury to her person while she was a passenger on one of the defendant's trains.

There were three counts to the complaint. The first and third counts charged simple negligence. The second count charged wantonness on the part of the defendants servants or agents.

There were four pleas to the complaint, which pleas were filed as answers to the complaint as a whole and to each count of the complaint separately. Plea 1 was the general issue. Plea 2 was a plea of contributory negligence.

Plea 3 set up that the injury of plaintiff was due to unavoidable accident, and of course, if *that* was true, *that* fact could have been shown under the general issue. If the injury was due to unavoidable accident, it was not, of course, due to the negligence of the defendant or of its servants or agents, nor to the wantonness of the defendant's servants or agents.

Plea 4 was a plea setting up assumption of risk.

Pleas 2 and 4 were not answers to the wanton count and the court sustained the plaintiff's demurrer to those

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pleas as answers to that count. This, of course, was a judicial determination by the trial judge that those pleas were not answers to the complaint as a whole but only to the counts charging simple negligence.

1. The plaintiff contends that pleas 2 and 4 were subject to certain technical defects. We do not think that it is necessary for us to consider the questions thus sought to be raised for reasons which will plainly appear below.

2. When a plaintiff brings a suit and bases his right of recovery upon the negligence of another, he must show a state of facts from which the negligence charged in his complaint may be reasonably inferred. To use almost the very language of this court in *American Cast Iron Pipe Co. v. John Landrum*, *infra*, 62 South. 757, and of the Supreme Court of the United States in *Patton v. Texas Pacific Railroad Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, where the testimony leaves the matter so uncertain that any one of a half dozen things may have brought about the injury, for some of which the defendant might be responsible as for an act of negligence and for some of which he would not be so responsible, it is not for the jury to guess between these half dozen causes and find that the negligence of the defendant was the real cause "when there is no satisfactory foundation in the testimony for that conclusion." In such a case the plaintiff simply "fails in his testimony, and no mere sympathy for the unfortunate victims of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is undoubtedly true, as stated by the plaintiff's counsel in their brief, that the affirmative charge should not be given in favor of a defendant when the evidence in the case is such as to authorize a reasonable inference of the plaintiff's legal right to recover; but this

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well-settled rule in no way conflicts with the rule announced in the cases above cited.

It seems that the plaintiff was a passenger on one of the defendant's trains and in alighting she fell to the platform and received certain injuries. In her testimony she thus describes the incident: "I am the plaintiff in this case. I remember Sunday, the 29th of August, 1909, when I went over from Kellyton to Alexander City on the Central of Georgia passenger train with my husband. When we got to Alexander City Mr. Carlisle left the train at Alexander City first and had the baby. I had a suit case, parasol, and fan, some in each hand. The conductor went off before I did. When I started to go down the step something caught my shoe heel and caused me to fall. I was on the step when I stepped off of the platform when this happened. I fell backwards. My feet hit the ground. I was lying on the steps. I don't know exactly when the heel got fastened, but something pulled it. I could not get it loose when I fell. I was trying to go on down the steps when the heel pulled off. I never paid any attention to the steps. The conductor was standing off a piece from the steps with his back to me. * * * At the time my heel got caught my foot was on the first step after I left the platform. I received an injury; my ankle was sprained. The conductor asked me if I was hurt. I told him I didn't think I was. I didn't know at that time that I was hurt. I discovered that I was hurt just as I turned to walk off. At the time I told the conductor I didn't think I was hurt, I hadn't undertaken to walk any. When I undertook to walk I ascertained that I was hurt. My ankle was swollen and I could not walk. That evening or next day my ankle was swollen--pained me. It stayed swollen up like that three or four days. It has never gotten back to its natural size

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yet. It is larger now than it was before; larger than the other ankle. This is the only injury I ever had on that ankle. It bothers me some in walking now. I suppose it was nearly a month that my ankle continued swollen and sore. It pains me sometimes yet. I can tell by looking at it that it is larger than the other one, and larger than it was before it was hurt. A part of the shoe heel that was pulled had tacks in it. I don't know exactly how long they were. There were at least 10 or 12 sticking in the piece of the shoe heel that was pulled off. They were bent. I don't know whether they were all bent in the same direction. The shoe heel was not very high, nothing unusual about the height or smallness of the heel. There was nothing wrong with the shoe heel before that. The shoe heel was the character of shoe heel worn by the ladies on their shoes at that time." This witness was examined by the defendant's counsel and said: "I wore those shoes most of the time. I didn't have low, flat, common-sense heel shoes. There was such a shoe for ladies for that day. These were mostly my Sunday shoes. I wore them part of the time every day. When I started down the steps I was looking down at the ground in front of me. I never looked at the steps. I saw the shoe heel after I got up. This was all I saw on the steps." The above was all of the testimony for the plaintiff.

The plaintiff's theory is that there was some defect in the steps of the train and that therefore the defendant was guilty of negligence in not providing her with a safe way to leave the train. The plaintiff saw no defects in the steps and no one else saw any. It is true that she testified that "there was nothing wrong with the shoe heel before that time," but she also testified: "I saw the shoe heel after I got up. This was all that I saw on the steps." It is also true that the conductor

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testified that: "I knew when she slipped there must have been something the matter either with the steps or the heel; I don't know which. She would not have slipped if there had not been something the matter either with the heel or the steps; I cannot say which. I don't know yet, except I picked up a piece of heel; that is all I know." The conductor, however, also testified that if there was anything wrong with the steps he never saw it at any time.

As we understand the testimony, the steps were simple, plain, plank steps with an iron railing on one side of them; and we think that the plaintiff's injuries were in all human probability due to the fact that she did not look at the steps at all when she descended but was, as she testified, looking beyond them to the ground. Whenever a patent defect exists in anything, the defect is usually the first thing which the observer sees when he first places his eye upon the object. All the evidence shows that the steps in question had been used for many years, and there was no more evidence in this case tending to show a defect in the steps than there was to show a defect in the high-heel shoes. In making a guess between the two, the probabilities are that the defect (if it can be called a defect) more probably existed in the high-heel shoes than in the steps. It is a matter of common knowledge that shoes with high heels are less safe and less comfortable than those with ordinary common-sense heels. The plaintiff was, as a prerequisite to her right of recovery, required to show that her injuries were due to an act of negligence on the part of the defendant, and it was, of course, incumbent on her to show some *fact* from which reasonable men could infer an act of negligence. She showed that she sustained a fall, but she did not show that the *cause* of the fall was a defect in the steps.

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3. At the time of the creation of the Court of Appeals, this case, on a former appeal, was pending in this court. An opinion on that appeal was prepared by Mr. Justice Somerville, of this court, and, upon the creation of the Court of Appeals, the record in the case was transferred to the Court of Appeals. That court, after considering the record, adopted, as the opinion of that court, the opinion which had been prepared by Mr. Justice Somerville, and the case made on that appeal is reported in 2 Ala. App. 514, 56 South. 737. In *that* opinion it was determined that, under the facts shown in *that* record, the plaintiff had failed to make out her case. In *that* opinion the merits of this case are fully dealt with. We have carefully compared the two records and we find no material difference in them. The evidence in both records is substantially the same. It seems to us that the opinion on the former appeal is sound and that it clearly demonstrates that in this case, under the facts as shown by all the evidence, the plaintiff has failed to make out a case against the defendant.

All the evidence fails to show negligence on the part of the defendant, and the questions of contributory negligence, assumption of risk, and wantonness, under the evidence most favorable to the plaintiff, did not arise and could not have arisen on her trial. The consideration of mere technical objections to the defendant's pleas would therefore serve no useful purpose. The plaintiff having failed in her proof, the case never proceeded to the point where those questions were of any value to the plaintiff.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

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Injury to Passenger.

(Decided June 19, 1913. Rehearing denied June 30, 1913.
62 South. 710.)

1. *Carriers; Setting Down Passengers; Time.*—The carrier owes its passengers the duty to stop its train long enough for them to get off at their stopping place; while such length of time depends often upon peculiar circumstances, yet it is generally, such as passengers using reasonable diligence require in which to alight.

2. *Same; Complaint.*—A complaint averring that defendant negligently tailed or refused to stop said train * * * a sufficient length of time for plaintiff to alight while the train was not in motion was not objectionable as requiring too long a stop, and as not alleging that plaintiff did not have a reasonable time in which to alight.

3. *Same; Instruction.*—Where the action was by a passenger for damages for being carried beyond her destination, a charge that the jury must find that defendant negligently failed to stop long enough for plaintiff to get off in safety, cannot be said to be erroneous, although not as comprehensive as it might have been.

4. *Evidence; Hearsay.*—Where the action was by a married woman accompanied by her husband, seeking damages for being carried beyond her destination, the testimony of the husband that when he found the flagman a few minutes after the train had started from the station of destination, he asked such flagman why he did not stop long enough for them to get off, and that the flagman replied that he did, and did not have time to back the train, was a hearsay narrative and inadmissible.

5. *Appeal and Error; Harmless Error.*—The admission of hearsay testimony corroborative of the only material point in dispute was prejudicial error as the court cannot say what effect its admission may have had on the jury.

6. *Same.*—Where the action is by a passenger for being carried beyond destination, the admission of evidence that it was the custom of defendant to put a step on the ground at the destination station to assist passengers to alight, and that on the day in question it was not done, if error, was cured where such evidence was subsequently stricken.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by Nannie Cornelius against the Louisville & Nashville Railroad Company, for damages for being carried beyond her destination while a passenger on

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one of defendant's trains. Judgment for plaintiff and defendant appeals. Reversed and remanded.

TILLMAN, BRADLEY & MORROW, for appellant. The court should have sustained demurrer to count 3.—*Bir. U. Ry. v. Smith*, 90 Ala. 50; *B. & A. Ry. Co. v. Norris*, 59 South. 63. There was no necessity to refile the demurrer after the amendment to the complaint, since the amendment was not made to meet the point in the demurrer.—*B. R. L. & P. Co. v. Fox*, 56 South. 1013. The court erred in admitting the testimony of the husband relative to his conversation with a flagman.—*A. C. G. & A. v. Appleton*, 54 South. 638; *Mobile Co. v. Baker*, 158 Ala. 493; *A. G. S. v. Taylor*, 129 Ala. 238; *T. C. I. v. Danforth*, 112 Ala. 80; *Cutver v. Ala. Mid.*, 108 Ala. 330; *Chewning v. Ensley Ry.*, 100 Ala. 493; *Womack's Case*, 84 Ala. 149. The admission of this evidence cannot be justified on the theory that it was error without injury, as it was upon the only material point in the case. Injury is presumed where error is apparent.—*McDonald v. Wood*, 118 Ala. 589; *Bolton v. Cuthbert*, 132 Ala. 407; *Moore v. Clay*, 24 Ala. 235; *B. R. L. & P. v. Beck*, 55 South. 428; *Marsh v. Frick*, 1 Ala. App. 655, and authorities supra.

BLACK & DAVIS, for appellee. The complaint was sufficient as against the reasons urged in the demurrer.—5 Mayf. subd. 74; 7 Words & Phrases, 6763; 33 N. W. 485; *So. R. v. Burgess*, 42 South. 35; *Dilburn v. L. & N.*, 156 Ala. 228. Even if the evidence was not admissible defendant lost the benefit thereof by failing to object to the question.—*Thomas v. Williams*, 54 South. 494. The entire answer was not inadmissible and the objection should have separated the good from the bad.—*M. & B. v. Worthington*, 10 South. 839. Even if error, the admission of the evidence was harmless.—*Moore v. Bar-*

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ber A. Co., 118 Ala. 523; *Union F. & M. Co. v. Lankford*, 145 Ala. 667; sec. 4056, Code 1907. Counsel discuss the other assignments of error, but without further citation of authority.

SAYRE, J.—Appellee sued as a passenger for damages for that defendant carried her beyond her agreed stopping place. The complaint averred that the defendant “negligently failed or refused to stop said train at Graces a sufficient length of time for the plaintiff to alight while the train was not in motion.” Defendant demurred to the complaint as exacting too much of it. It is said that there should have been an averment that plaintiff had not time to alight, using reasonable diligence. We think the pleading fairly and sufficiently warned defendant of the cause and character of the complaint it was called upon to answer. Defendant negligently failed or refused to allow plaintiff a sufficient time to alight. The rule is to construe pleadings against the pleader on demurrer, but that is a reasonable rule and does not allow strained constructions in order that a pleading be condemned. It does not require us to treat the complaint in this case as laying upon defendant the duty to hold its train at its stopping place while plaintiff slept, chatted with other passengers, or loitered on the way, before exercising herself to get off. It is no erroneous statement to say that a carrier’s duty is to stop its train long enough for passengers to get off at their agreed stopping places. That length of time may in cases depend upon peculiar circumstances, but in general it is such as passengers, using reasonable diligence, require. Great generality is allowed in the statement of negligence as a cause of action. It was not necessary for the plaintiff to characterize her own conduct, but that of defendant, and

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this the complaint in its final shape (count 3 as amended) did, in a way which left no room for misapprehension on the part of defendant, when it charged that defendant negligently failed or refused to stop its train a sufficient length of time for plaintiff to alight. It might with much propriety have said "a reasonable time under the circumstances," or "a sufficient time for plaintiff, exercising reasonable diligence, to alight," as defendant suggests, but the allegation in either of those shapes would have been no less a conclusion, nor can we think it would have further illuminated defendants understanding of the cause of complaint. Without dwelling too long on the point, we state our opinion that the complaint was not objectionable.

Plaintiff's husband was traveling with her and testified for her. His testimony was that the train made a very short stop and that, owing to the aisle of the car being crowded, he was unable to get his wife, child, and luggage off the train. He was allowed to testify, over defendant's objection, that when he found the flagman a few minutes after the train had moved away from the station the following conversation passed between them: "I asked him why he did not stop the train long enough for me to get off, and he said he did, and I told him we did not have time to get off, and I asked him then to back the train so we could get off, and he said he did not have time." This was not of the *res gestæ* of the negligence complained of, was a narrative by the parties to the conversation, and from their respective viewpoints of a transaction then past was hearsay and should not have been allowed. Defendant's motion to exclude should have been granted.—*Mobile Company v. Baker*, 158 Ala. 495, 48 South. 119, and cases cited. Nor do we think, on reconsideration, that the judgment can be saved from reversal on the ground that this ruling

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had no prejudicial effect upon defendant's case. Very clearly plaintiff, by a part of this testimony, sought to sustain and re-enforce the testimony of her witness on the the only material point of dispute in the case by showing that shortly after the transaction in question he made a statement of what had happened, which statement was in accord with his testimony at the trial. We cannot know what effect this testimony may have had on the jury. The point at issue was material. The testimony was incompetent and illegal.—*Mobile Light Co. v. Baker*, 158 Ala. 495, 48 South. 119; *M. & C. R. R. Co. v. Womack*, 84 Ala. 150, 4 South. 618; *A. G. S. R. R. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403. It is well settled by the more recent decisions of this court that in civil causes the appellate court, if it would avoid a reversal for error shown, must be able to point to something in the record which clearly and satisfactorily shows that no injury resulted.—*Donovan v. S. & N. R. R. Co.*, 79 Ala. 431. In its early history this court followed the rule that a cause must be reversed for error shown unless it appeared from the record that it was "impossible that injury could have accrued to the party against whom the error was committed" or, it was otherwise stated, unless it appeared "beyond a reasonable doubt that injury did not result from error."—*Pinkston v. Greene*, 9 Ala. 23; *Hagerthy v. Bradford*, 9 Ala. 571. Until a statute was passed, which had some effect to the contrary, this court declined absolutely to apply the doctrine of error without injury to questions arising in prosecutions for crime.—*Mitchell v. State*, 60 Ala. 26; *Maxwell v. State*, 89, Ala. 164, 7 South. 824; Chief Justice Stone said in *Vaughan v. State*, 83 Ala. 57, 3 South. 530, that it would be a hazardous precedent to establish the doctrine in such cases. The hazard he had in mind must attend a total destruction of the doctrine

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of presumed injury in any class of cases; but we do not doubt that the modification of the rule stated in *Donovan's Case, supra*, was based upon sound reason. The modified rule has been consistently and repeatedly followed.—*Calloway v. Truitt*, 143 Ala. 528, 39 South. 277, and cases there cited. It is the settled law of this state. The universality of its acceptance by the courts of the country would seem argument enough in favor of both its propriety and necessity as a rule of decision. Applied to this case, it means that there was injury, reversible error, in the ruling under consideration, for we cannot see clearly or satisfactorily that the evidence erroneously admitted had no effect upon the minds of the jury nor what its effect was. For this error the judgment will be reversed.

Proof that defendant was accustomed to put a step on the ground at plaintiff's station in order to assist passengers in alighting, in connection with proof that on the occasion in question observance of the rule or custom was omitted, would tend in some slight degree to confirm plaintiff's theory of undue haste in the operation of the train. At any rate, the court's subsequent action took this evidence out of the case, and error cannot be predicated of its admission.

The court in its oral charge said to the jury, in connection with an approved definition of negligence: "You would have to believe from the averments of this [meaning the complaint] that the defendant company negligently failed to stop long enough for the plaintiff to get off in safety." Defendant excepted. In connection with an assignment of error based upon this exception the argument as to the demurrer to the complaint is repeated. It may be that the excerpt from the charge does not contain a comprehensive statement of the law of the case. No doubt further definition of defendant's

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duty in the premises, as measured by the time required for plaintiff, in the exercise of reasonable diligence, to alight, would have been serviceable with the jury. But that it was erroneous cannot be said.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Murphy v. McAdory, et al.

Assault and Battery and False Imprisonment.

(Decided June 5, 1913. 62 South. 706.)

1. *Sheriff and Constable; Action on Bond; Directing Verdict.*—Where the complaint was against a sheriff and his bondsmen jointly, and contained three counts, two of which under the evidence made no case against the bondsmen, who, if liable at all, were liable only for the breach of the official bond, the affirmative charge for plaintiff could not be given, even if the fact showed an unlawful restraint of plaintiff's person, as such charges should have been restricted to the third count for breach of the bond, or to a recovery against the sheriff alone.

2. *False Imprisonment; Elements; Malice.*—Malice is not an essential element of false imprisonment.

3. *Same; Pleading; Malice.*—Where a complaint in an action for false imprisonment alleged the unnecessary fact that the act was done maliciously, malice must be proven.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by Phillip Murphy against W. K. McAdory, and his official bond as sheriff, for damages for assault and battery and false imprisonment. Judgment for defendants and plaintiff appeals. Affirmed.

The gravamen of the action is the false imprisonment of plaintiff by defendant McAdory acting in his official capacity as sheriff of Jefferson county. The trial was had on the following admitted facts, as shown by the bill of exceptions; on January 4, 1912, plaintiff was

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imprisoned by defendant McAdory as sheriff of Jefferson county, in the county jail at Birmingham, Jefferson county, on a mittimus charging assault and battery with a weapon, and his case had been investigated by the grand jury of said county on that day. The fact is that they refused to find a true bill for any offense against plaintiff. The sheriff restrained plaintiff in said jail continuously from January 5, 1912, till March 19, 1912, when he was released by the said sheriff from said imprisonment. Plaintiff was able to and did obtain wages before and after he was in jail at the rate of \$1.50 per day. The United States Fidelity & Guaranty Company was the surety on the bond of W. K. McAdory as sheriff of Jefferson county. The clerk of the criminal court of Jefferson county refused to let defendant have access to the grand jury docket of Jefferson county showing the deliberation and orders of the grand jury, among which was the order finding a no bill against the plaintiff Murphy. The sheriff discharges prisoners where the grand jury finds no bill, and defendants are in jail upon the receipt of a written order by the solicitor showing the disposition of the case in the grand jury. The original order received by the sheriff from the solicitor in this case dated March 9, 1912, was not received by the sheriff until March 19, 1912, when plaintiff was discharged. The following is a copy of the order: To Walter K. McAdory, Sheriff of Jefferson County, Birmingham, Ala., March 9, 1912. By order of the Honorable Grand Jury of the Criminal Court of Jefferson County, you are directed to release the following persons from custody for the reasons set forth, No. 43: Phillip Murphy; offense A. and B. with W; disposition, no bill. (The grand jury docket shows this party on bond, and the release is issued on advice from W. L. Metcalf, deputy sheriff, on above date that that party is in jail.) H. P.

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Heflin, Solicitor, by John W. Lambert. Received of the Solicitor of Jefferson Couty, order for release of parties as set forth above. Signed, W. K. McAdory, Sheriff. The court refused to instruct the jury to find for plaintiff as requested in writing, and at the request of defendant charged that the sheriff is not the custodian of the grand jury docket, and that the clerk of the criminal court is the custodian of the grand jury docket, and that the docket shall be kept secret until defendants are released.

ALLEN & BELL, and J. Q. SMITH, for appellant. The action of the grand jury in finding no bill against the prisoner is a judicial act.—*Parsons v. Age Herald P. Co.*, 61 South. 345. A justification for one day has no legal effect towards justifying confinement on a subsequent day.—19 Cyc. 342, note 88 and cases cited. The motive of the sheriff and his diligence or lack of diligence are beside the issues in this case.—*Oates v. Bullock*, 136 Ala. 537; *Ex parte Sterns*, 104 Ala. 93; *Smith v. State*, 149 Ala. 53. The imprisonment was unlawful.—*White v. State*, 134 Ala. 197. Under the facts plaintiff made out a prima facie case.—5 Enc. of Evid. 733. In order for evidence of justification to be admissible in an action for false imprisonment, the facts must be specially pleaded.—8 Enc. P. & P. 850; 11 Cyc. 361; *Gamble v. Fuqua*, 148 Ala. 488.

GIBSON & DAVIS, for appellee. No brief reached the Reporter.

SOMERVILLE, J.—Conceding, without deciding that the facts in evidence show an unlawful restraint of plaintiff's person for which an action lies against the sheriff and his bondsmen, yet the general affirmative

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charge as requested by plaintiff was properly refused to him for two reasons:

1. The action is against the sheriff and his bondsmen jointly and contains three counts, the first two of which are, respectively, for an unlawful imprisonment and for an assault and battery by the defendants. Obviously on these two counts the evidence makes no case against the bondsman, who was liable, if at all, only by contract for the breach of the sheriff's official bond. Hence the charge requested should have been restricted to the third count, which is for breach of the bond, or else restricted to a recovery against the sheriff *alone*.

2. The first and third counts, grounded on a false imprisonment, declare that the act was *maliciously* done. While malice is not an essential element of false imprisonment, yet, when the offense is thus characterized in the complaint, malice must be proved or the case fails. —*Rich v. McInerny*, 103 Ala. 345, 354, 15 South. 663, 49 Am. St. Rep. 32; *Fuqua v. Gambill*, 140 Ala. 464, 37 South. 235.

There is nothing in the evidence here to indicate malice in the unlawful restraint of plaintiff by the sheriff or his deputy, certainly not as matter of law. For this reason also it cannot be held that the verdict was contrary to the law or the evidence.

The two special charges, if material, are not referred to in argument and need not be considered.

No error appearing, the judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur.

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Middleton v. Western U. Tel. Co.

Damage for Delay in Delivery Telegram.

(Decided June 12, 1913. Rehearing denied June 30, 1913.
62 South. 744.)

1. *Telegraphs and Telephones; Delay in Delivery; Damages.*—Where a telegraph company delays the transmission of a telegraph message, and thus prolongs the already existing mental anguish of the addressee, damages for the prolongation of such anguish may be recovered, since there is no distinction in principle in the act prolonging mental anguish and the negligent act causing mental anguish.

2. *Same.*—No recovery for mental anguish can be had, caused by a delay in delivery of telegram, unless such damage was within the contemplation of the parties, and from the language of the message or otherwise, the telegraph company had notice that its negligence or default would likely cause damages.

3. *Same.*—Where a telegram was addressed to a married woman and stated that no damage had been done to a school and the children therein, it charged the company with notice that any delay in its transmission might prolong the mental anguish of the sendee of the message; it also appearing that the school referred to was situated in a town which had been swept by a tornado.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by Mrs. H. V. Middleton against the Western Union Telegraph Company, for damages for delay in delivering telegram. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The allegations of the complaint are in effect that H. V. Middleton and the present plaintiff were the parents of an afflicted female child, which was a student and residing in the building maintained by the state of Alabama, for the instruction of the blind at Talladega, Ala., and that on May 12th, there was a severe storm, and the morning papers following carried an account of Talladega being cyclone-swept, a number dead, and quite a list of damages, stating also that the State

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School for the Deaf, the State School for the Blind, the Alabama Synodical College, two large negro schools, a number of business houses were demolished, and that the names of the dead and injured were not now obtainable; that said item was read by plaintiff; that it was calculated to and did inspire great mental pain and anguish, uncertainty and distress of mind as to the safety of plaintiff's daughter, and that plaintiff facilitated the departure of her husband for Talladega, and in great anxiety and perturbation of spirit waited throughout the day at her home in Birmingham for some message regarding the condition found by her husband upon his arrival at Talladega, and as to the safety of their daughter, and that Middleton, the husband, at 3:30 p. m. did deposit and place with the servant or agent of defendant at Talladega for the sole benefit and interest of the plaintiff, at the same time advancing to the said servant or agent of defendant a sum of 25 cents charges, the following telegram: "Mrs. H. V. Middleton, 904 First Avenue, West End, Birmingham, Ala. No damage to school and children. Home 7:30 alone. H. V. Middleton." And that same was deposited solely for the benefit of plaintiff, and to relieve her mind of uncertainty, fear, and pain. The breach alleged is the failure to promptly transmit and deliver for more than five hours, with the attendant damages. The court granted the motion to strike the several elements of damages for mental anguish, whereupon the plaintiff took a nonsuit with bill of exceptions.

FRANCIS M. LOWE, for appellant. A recovery could be had for the prolongation of already existing mental anguish if caused by the negligent act of the telegraph company.—37 Cyc. 1786-7, notes 95-6-7; 48 S. E. 538; 102 S. W. 681; 105 S. W. 155. On the doctrine of prox-

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imate cause under the facts in this case, counsel cite.—32 Cyc. 745 and note; 33 Atl. 1017; 51 Am. St. Rep. 750; 35 L. R. A. (N. S.) 930; 12 S. E. 427; 106 S. W. 698.

GEORGE H. FEARONS, and FORNEY JOHNSTON, for appellee. This case might be affirmed for the reason that the complaint does not state a cause of action which would support a judgment for plaintiff under the well considered case of *W. U. T. Co. v. Adams*, 154 Ala. 657. However, the ruling of the trial court is overwhelmingly supported by the great weight of authority.—*W. U. T. Co. v. Ayres*, 131 Ala. 391; *Same v. Westmoreland*, 151 Ala. 319; *Same v. Sledge*, 153 Ala. 291; *Same v. Howle*, 156 Ala. 331; *Sledge v. W. U. T. Co.*, 163 Ala. 4; *Leland v. W. U. T. Co.*, 159 Ala. 245; *W. U. T. Co. v. Peagler*, 163 Ala. 38.

ANDERSON, J.—In some cases it has been held that there can be no recovery for mental anguish where the negligence of the defendant telegraph company merely causes a prolongation of mental anguish already existing, but which a delivery of the message would have relieved.—37 Cyc. 1786; *Sparkman v. Western Union Co.*, 130 N. C. 447, 41 S. E. 881; *Rowell v. Western Union Co.*, 75 Tex. 26, 12 S. W. 534, and other Texas cases. On the other hand, several very respectable courts have failed to appreciate a distinction between the production of mental anguish and the prolongation of same, and we agree with these courts, in the holding that the distinction attempted by the Texas Court and adopted by the North Carolina court is too shadowy, and in legal and physical results is merely imaginary.—*Western Union Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105, 13 Ann. Cas. 397; *Dayvis v. Western Union Co.*, 139 N. C.

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79, 51 S. E. 898 (wherein the holding on this point in the *Sparkman Case*, *supra*, was disapproved); *Fass v. Western Union Co.*, 82 S. C. 461, 64 S. E. 235; *Willis v. Western Union Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52; *Cornelly v. Telegraph Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919; 3 Sutherland on Damages, § 975. While this court has limited the right to recover for mental anguish to parties bearing a certain relationship (*Telegraph Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92) and to cases of death or sickness (*Sledge v. Western Union Co.*, 163 Ala. 4, 50 South. 886; *Westmoreland's Case*, 151 Ala. 319, 44 South. 382), we have never held that the parties were confined to mental anguish actually produced as distinguished from a prolongation of mental suffering. In other words, if a negligent failure to deliver a message tends to increase or continue mental suffering, we see no good reason why damages should not be recovered for same upon the same theory that a recovery is allowed for originally causing or producing mental anguish. The *Leland Case* in no sense approves this distinction. This case is first reported in 156 Ala. 334, 47 South. 62, and we purposefully pretermitted deciding this identical question, but expressly decided the case upon the idea that the failure to deliver the message could not increase or diminish the mental anguish of the plaintiff. Said the court, speaking through the present writer: "The failure to deliver the telegram in question did not, under the proof, proximately increase or diminish in the slightest degree the mental anguish of the plaintiff." Upon the next appeal of this case (159 Ala. 245, 49 South. 252), while the opinion as written by Simpson, J., discussed this question and shows an inclination to approve the holding in the Texas cases and the case of *Sparkman*,

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supra, and does not treat the *Willis Case* very seriously, the point was not decided, as the opinion concludes as follows: "Without deciding this point, even under the *Willis Case* and our own previous decision in this case, there is no evidence in this case tending to show that, if the answer had been received, it would have given any information different from that he already had." Moreover, the writer in discussing the authorities on the foregoing point, overlooked the fact that the distinction made by the Texas court had not only been ignored in cases other than the *Willis Case*, but had been severally criticised by text-writers and courts in other jurisdictions. In fact the North Carolina case of *Sparkman*, the only one following the Texas cases, was subsequently overruled in the case of *Dayvis v. Tel. Co.*, 139 N. C. 79, 51 S. E. 898.

We have also held that in order for the plaintiff to recover for mental anguish the damage must have been within the contemplation of the parties, and that there can be no recovery on this ground unless the telegraph company had notice, from the language of the message or otherwise, that by reason of its negligence or default such damages would be likely to result.—*Westmoreland's Case*, 151 Ala. 319, 44 South. 382; 37 Cyc. 1780. We are of the opinion that the plaintiff's complaint makes out a case for the recovery of damages for mental anguish and brings her within the protection of the rule as sanctioned in this jurisdiction. It is addressed to the mother of a child, to whose life or safety it refers, and carries notice on its face that a negligent failure to deliver same will likely prolong or increase the mental anguish of the mother, the sendee, and for whose benefit it was sent, and the trial court erred in sustaining the defendant's motion to strike this claim for damages from the complaint.

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The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Louisville & Nashville Railroad Co. v. Godwin.

Injury to Passenger.

(Decided June 12, 1913. 62 South. 768.)

Carriers; Passengers; Injuries; Presumptions.—A presumption prima facie will arise that the accident was due to the negligence of the carrier or its servant upon proof that an accident occurred to the vehicle on which the passenger was riding, and that injury occurred to the passenger therefrom.

APPEAL from Morgan Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Minnie M. Godwin against the Louisville & Nashville Railroad Company for injuries sustained by plaintiff while a passenger. From a judgment setting aside a judgment for defendant, it appeals. Affirmed.

The charge referred to is as follows: "I charge you that if you are reasonably satisfied from the evidence that plaintiff was a passenger on defendant's train as averred, and was injured as averred while she was such passenger, then I charge you that such presumption of defendant's negligence arises."

EYSTER & EYSTER, for appellant. The charge refused to the plaintiff and the charges given for defendant were properly acted upon, and were not good grounds for motion for new trial; hence, the court erred in

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granting the new trial.—*M. L. & P. Co. v. Bell*, 153 Ala. 90; *So. Ry. v. Carter*, 164 Ala. 107; 77 N. E. 1049; 97 S. W. 128.

ARTHUR L. BROWN, and W. R. FRANCIS, for appellee. The court properly granted a new trial as plaintiff was entitled to have charge 1 requested by her given.—*B. R. R. Co. v. Hale*, 90 Ala. 8; *M. & E. R. R. Co. v. Mallette*, 92 Ala. 210; *B. R. L. & P. Co. v. Moore*, 148 Ala. 115.

ANDERSON, J.—As a general rule where it is shown that an accident occurred upon a railway, from which a passenger sustained an injury, by the breaking down or the overturning of the vehicle, or by a derailment of the train or some of the cars, or by a collision between two cars, or by an unusual jerk or jolt of the train, or by the parting of the train, or by the breaking down of a bridge, or by the falling of some of the appliances within the vehicle, or by obstruction, which the carrier has placed too near the track, striking the side of the train, a prima facie presumption will arise that the accident was due to the negligence of the company or its servants.—Hutchinson on Carriers, § 1414, *Birmingham R. R. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748; *M. & E. R. R. Co. v. Mallette*, 92 Ala. 210, 9 South. 363; *Birmingham R. R. Co. v. Moore*, 148 Ala. 115, 42 South. 1024. This rule, however, applies as to passengers and not employees. It is sufficient to say that charge 1, refused to the plaintiff, should have been given; and, as its refusal would have worked a reversal of the case upon appeal by the plaintiff, the trial court properly granted the motion for a new trial.

The two cases cited by the appellant have no bearing upon the case at bar. The case of *So. R. R. Co. v. Carter*, 164 Ala. 103, 51 South. 147, involved an action by an employee and not a passenger. The case of *Mobile*

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R. R. Co. v. Bell, 153 Ala. 90, 45 South. 56, did involve an action by a passenger, but the burden of proof was not involved. The decision in that case was grounded upon a demurrer to the complaint because it showed that the negligence charged was not the proximate cause of the injury.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Western Railway of Alabama v. McGraw.

Injury to Passenger.

(Decided May 15, 1913. 62 South. 772.)

1. *Carriers; Passengers; Injuries; Presumption.*—Where a passenger is injured by the breaking down, overturning, derailment or collision of a car on which he is riding, or sudden jolt of the train, or by some cause within the car, or by an obstruction on the track or near thereto, the presumption arises *prima facie* that the accident was due to the negligence of the carrier; this is not true, however, where the accident causing the injury is not to the vehicle, but to the passenger, nor where the injury is caused while the passenger is alighting from the vehicle by stepping on an object improperly left on the platform, etc., and in such a case, proof of the injury alone will not be sufficient to charge a carrier with negligence.

2. *Same.*—Where the injury to a passenger is such as to give rise to the presumption, under the doctrine of *res ipsa loquitur*, of negligence on the part of the carrier or its servant, the duty is on the carrier to exonerate itself from liability by showing that the accident was inevitable, or that it could not have been avoided by the exercise of the utmost care reasonably consistent with the conduct of the business.

3. *Same; Complaint.*—Where each count of the complaint alleges facts sufficient to show *prima facie* negligence under the doctrine of *res ipsa loquitur*, in an action for injury to a passenger, the counts were not subject to demurrer.

4. *Same.*—Where each count alleges facts sufficient to raise the *prima facie* presumption of negligence under the doctrine of *res ipsa*

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loquitur for injury to a passenger, the counts were not defective for a failure to allege a particular or specific act of negligence.

5. *Same; Negligence of Third Person.*—Where the action was for injury to a passenger caused by derailment, pleas which allege generally that the derailment was caused by a third person, but which failed to negative that the negligence of defendant may have concurred with that of the third person to cause the injury, are insufficient on proper demurrer.

6. *Negligence; Pleading; General Averments.*—In an action for injury, a general averment of negligence is sufficient, if the facts stated show the existence of a duty on the part of defendant to act, arising out of the relation of the parties.

APPEAL from Lee Law and Equity Court.

Heard before Hon. LUM DUKE.

Action by C. T. McGraw against the Western Railway of Alabama for injuries sustained while a passenger. Judgment for plaintiff and defendant appeals. Affirmed.

GEORGE P. HARRISON, for appellant. The complaint was demurrable as it averred a conclusion and stated no facts from which negligence could be inferred.—*M. T. L. Co. v. Burns*, 165 Ala. 242; *Pa. Cas. Co. v. Perdue*, 164 Ala. 508; *B. R. L. & P. Co. v. Weathers*, 164 Ala. 23; *Meyer v. Black*, 139 Ala. 174. The third count contained an alternative which rendered the whole count subject to demurrer.—*Osborn v. Ala. S. & W. Co.*, 135 Ala. 571. On these authorities it is insisted that the court should have sustained the demurrer to counts 4, 5 and 6. The court also erred in sustaining demurrer to defendants pleas 2, 3 and 4.—*Williams v. Woodward I. Co.*, 106 Ala. 254; *Wes. Ry. v. Walker*, 113 Ala. 267; *Irwin v. L. & N.*, 161 Ala. 489; 33 Cyc. 742.

BARNES & DENSON, for appellee. Counts 1, 2, 3 and 4 were sufficient.—*L. & N. v. Jones*, 83 Ala. 376; *B. R. L. & P. Co. v. Barrett*, 60 South. 252; *B. R. L. & P. Co. v. Goldstein*, 61 South. 280; 31 Cyc. 287. Counts 6 and 7 were entirely sufficient.—*Armstrong v. Mont. St.*

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Ry., 123 Ala. 233; *B. R. L. & P. Co. v. Adams*, 146 Ala. 267; *Same v. Wright*, 153 Ala. 99; *L. & N. v. Church*, 155 Ala. 359. The court was not in error in sustaining demurrer to the pleas.—29 Cyc. 488.

MAYFIELD, J.—“Where * * * it is shown that an accident happened upon a railway, from which a passenger sustained an injury, by the breaking down or the overturning of the vehicle, or by derailment of the train or of some of the cars, or by a collision between two trains or between two cars, or by an unusual jerk or jolt of the train, or by the parting of the train, or by the breaking down of a bridge, or by the falling of some of the appliances within the vehicle, or by an obstruction, which the carrier has placed too near the track, striking the side of the train, a prima facie presumption will arise that the accident was due to the negligence of the company or its servants.”—3 Hutchinson on Carriers, p. 1701 et seq., § 1414; *Mallette's Case*, 92 Ala. 209, 9 South. 363; *Hill's Case*, 93 Ala. 521, 9 South. 722, 30 Am. St. Rep. 65; Thompson on Carriers, 181 et seq.; Wood's Railway Law, 1096.

“Where, however, the injury is received while the passenger is about the carrier's premises, or, if in the vehicle, where the accident causing the injury is to him and not to the vehicle, or where the injury is caused while the passenger is alighting from the vehicle by his stepping upon an object which has been left upon the depot platform, the mere fact of the injury will not be sufficient to charge the company with negligence. ‘It is only,’ said the court in *Stager v. Railway*, 119 Pa. 70, 12 Atl. 821, ‘when the injury occurs from agencies peculiarly within the defendant's power that he can be presumed, without proof, to have acted negligently.’”—3 Hutchinson on Carriers, pp. 1705-06, § 1414.

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"It generally happens, therefore, in actions against the carrier in which his liability depends upon the finding of negligence, that, in proving the injury the character of the accident is also shown, from which it can be seen whether there was negligence, or so strong a probability of its existence as to amount to a presumption against the carrier, and to cast upon him the burden of disproving it; and whenever it appears that the accident was of that kind which, according to common experience, does not usually occur except from some fault of the carrier himself or of his servants, or from some imperfection in his conveyance or its appliances, or from the unsafe condition of his road, a *prima facie* case is made against him, and to exonerate himself from liability he must show that the accident was inevitable, or that it could not have been avoided by the exercise of the utmost care and foresight reasonably consistent with the prosecution of his business."—*Id.*, p. 1706, § 1415.

Each count of the complaint alleged all the facts which are necessary to show *prima facie* liability of the carrier for the injury suffered by the passenger, and was therefore not subject to the demurrer interposed.

In such cases no particular or specific act of negligence, of omission or commission, is required to be alleged or proven to support the action. Rules of pleading in actions of this kind form an exception to the general rules of pleading in negligence cases. The fact that the law raises a presumption of negligence from the facts alleged relieves the pleader of the necessity of alleging any specific act of negligence or breach of specific duty, controlling in other cases.

The cases which form the exceptions to those in which the general rule of pleading, as above stated, governs, were well pointed out by this court long ago, and have

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been often quoted since; but, as the rule of pleading in this excepted class of cases is different from the general rule, and pleaders so often fail to observe it, we here restate the class, and, as will be noted from the quoted statement, this court itself sometimes overlooks the distinction.

"A general averment of negligence has been held sufficient, when the complaint averred that the plaintiff sustained the relation of passenger to the railroad company, or was an infant of tender years, not capable of contributory negligence, or that the injury was to stock.—*L. & N. R. R. Co. v. Jones*, 83 Ala. 376, 3 South. 902; *Mobile & Montgomery Railway Co. v. Crenshaw*, 65 Ala. 566; *S. & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494. The statement of either of the foregoing facts has been regarded as a sufficient averment of facts showing the duty to act; but, in no case, except in *Alabama & Florida R. R. Co. v. Waller*, 48 Ala. 459, has a general averment of simple negligence been held sufficient, when not accompanied by an averment of facts from which the duty originates. In that case the death of plaintiff's intestate resulted from a collision. The complaint, as in this case, did not state that the decedent was a passenger or employee, or had any connection with the railroad company. The ruling that the complaint contained a proper statement of facts was based on the erroneous principle that the collision itself, and the consequent death of the plaintiff's intestate, were facts sufficient to create a presumption of negligence, for which the defendant was responsible."—*Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458.

It follows that there was no error in overruling the defendant's demurrer to any count of the complaint.

Each of the defendant's three special pleas 2, 3, and 4 was insufficient. While each alleged that the derail-

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ment complained of was caused by a third party, neither negated the defendant's negligence alleged in the complaint, which negligence was, in general terms, alleged to be in and about the carrying of the plaintiff as a passenger. For aught that appears in any one of these pleas the defendant's negligence may have concurred with that of the third party in producing the injury. While one of the pleas does allege that the act of the third party in derailing defendant's cars proximately caused the injury, it does not allege that it was the sole proximate cause; the negligence of the defendant may have concurred with that of the third party, and if so, the defendant would still be liable. It is not a case of contributory negligence, in which, if the negligence of the plaintiff concurs with that of the defendant and proximately contributes to the injury, the plaintiff cannot recover. In this case, the plea setting up the negligence of a third party and not that of the plaintiff, it must show that the negligence of such third party was the sole proximate cause of the injury, and not a mere contributing one. Moreover, the majority of the court are of the opinion that the defense attempted to be set up in these pleas was available under the general issue.

NOTE.—After the affirmance of this case, but before it was put out, the parties agreed in writing to a withdrawal of the appeal, and the court now dismisses this appeal per the agreement on file. All the Justices concur, except DOWDELL, C. J., not sitting.

[Waldrop v. Nashville, Chattanooga & St. Louis Railway.]

Waldrop v. Nashville, Chattanooga & St. Louis Railway.

Injury to Passenger.

(Decided May 15, 1913. Rehearing denied June 19, 1913.
62 South. 769.)

1. *Carriers; Passengers; Relation; Termination.*—Although a carrier was not legally required to maintain a waiting room at that particular station under section 5489, Code 1907, yet, where the railroad company had built a station and a waiting room at such point it could not arbitrarily deny the use thereof to a particular passenger.

2. *Same.*—In the case of steam railways the relation of carrier and passenger does not terminate at the moment the passenger alights at the station, but continues until the passenger has had a reasonable opportunity to leave the premises of the carrier in a proper manner and by the usual way.

3. *Same.*—The relation of carrier and passenger is a contractual one, requiring the carrier merely to carry the passenger between the agreed points; but the law raises the duty of the carrier to care for its passenger's comfort and safety so long as the relation continues.

4. *Same.*—Where a person goes to a railroad station with an intention in good faith to take passage upon the train, the carrier must provide him or her with a safe way of ingress and egress to and from the cars, and with a reasonably safe waiting place.

5. *Same; Destination.*—A carrier performs its whole duty by conveying the passenger safely to his destination. In the absence of special circumstances, and is under no duty to care for the passenger while preparing to further continue his journey.

6. *Same.*—If, upon reaching the depot at his destination, the passenger's condition is such that to at once leave the waiting room would be dangerous to his health and safety, he must be given reasonable opportunity to further safely continue his journey, or obtain assistance, and cannot be summarily ejected from the depot.

7. *Same.*—The facts considered as stated and held to render defendant liable for injuries resulting to plaintiff from her expulsion from the depot.

APPEAL from Etowah Circuit Court.

Heard before Hon. JAMES E. BLACKWOOD.

Action by Carrie Waldrop against the Nashville, Chattanooga & St. Louis Railway. From a judgment for de-

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defendant on demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Count 6 is as follows: "Plaintiff claims of defendant, a corporation, the sum of \$10,000 as damages, and avers, to wit, that on the 26th day of December, 1911, the defendant was a common carrier of passengers operating a steam railway between and through the towns of Albertville, Ala., and Attalla, Ala.; that Albertville, Ala., was and is a town of over 1,000 inhabitants; that on said date the defendant maintained in said town of Albertville a depot, which was used by all passengers to and from that point, and at which defendant's trains carrying passengers stopped for the purpose of receiving and discharging passengers; that the defendant maintained what was known as a waiting room in said depot, which was, at the time and had been for some time before, held open by defendant for and was customarily used by passengers discharged from defendant's trains at that point, to protect them in the case of inclement weather until they had a reasonable time to leave same safely. Plaintiff avers that on said date she became a passenger on one of defendant's trains at Attalla, Ala., paying her fare to Albertville, Ala.; that when defendant's train on which plaintiff was a passenger reached Albertville, in the morning about one or two hours before noon, the weather was extremely cold, the wind blowing at a high rate of speed, and the rain falling very heavily, which condition continued for several hours; that plaintiff entered said waiting room from the defendant's train, the defendant then and there holding the same open, as was customary, for the use and protection of its passengers discharged at that point. Plaintiff further avers that as soon as the train reached said depot, she sent for the conveyance which was to carry her away from said depot,

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and which was arranged to protect her and her children, who were with her, from exposure to the extremely severe weather; that it would have taken but a few minutes for said conveyance to reach said depot. Plaintiff avers that defendant's servant or agent in charge of said depot would not allow plaintiff to remain in said waiting room till said conveyance could reach there, and would not give her a reasonable time to arrange to depart therefrom without danger to her health and that of her children, but knowing the condition of the weather, knowing to make her leave said waiting room necessitated her being exposed to the weather, knowing it was highly dangerous to her health, and perhaps placed her in imminent peril of losing her life from sickness contracted thereby, yet with a reckless disregard of the necessarily dangerous and injurious consequences to plaintiff, said agent or servant of defendant, acting within the scope of his authority as such agent or servant, willfully caused plaintiff to leave said waiting room and become exposed to the cold, rain, and wind, and as a proximate consequence of said agent's act plaintiff was caused to become cold, wet, and uncomfortable, became very sick, and was caused to suffer much physically and mentally, and had her health permanently impaired, all to the damage of plaintiff as aforesaid."

The other counts are based on the same state of facts, but are wanting in several of the averments found in count 6.

Demurrers raise the questions discussed in the opinion.

MCCORD & DAVIS, and J. E. JOHNSON, for appellant. The case comes up squarely on the pleading, and it is insisted under the following authorities that the counts

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were not subject to the demurrers interposed, and that the court therefore erred in sustaining the demurrers.—*So. Ry. v. Nelson*, 41 South. 1006; *Melton v. B. R. L. & P. Co.*, 45 South. 151; *A. G. S. v. Sellers*, 93 Ala. 9; 5 A. & E. Enc. of Law, 499; 83 S. W. 902. Although not required by section 5489, Code 1907, to erect a waiting room at this particular station, yet having erected it and used it for the purpose of those seeking passage on its trains, the railroad company could not deny its use to any particular passenger.—*L. & N. v. Kellar*, 47 S. W. 1072; 14 South. 49; 49 South. 376; 75 Ala. 604. Under the facts stated the case of wanton negligence was made out rendering the railroad company liable in damages for any injuries resulting to plaintiff from having been expelled from the station.—*M. & C. R. R. Co. v. Martin*, 117 Ala. 267; *L. & N. v. Brown*, 121 Ala. 221; *Peters v. So. Ry.*, 125 Ala. 537; *Montgomery St. Ry. v. Rice*, 144 Ala. 610; *Same v. Lewis*, 148 Ala. 134; *M. J. & K. C. Ry. Co. v. Smith*, 153 Ala. 127.

GOODHUE & BRINDLEY, and SPRAGINS & SPEAKE, for appellee. Under the principles decided in the cases of *N. C. & St. L. Ry. v. State*, 137 Ala. 439, and *Page v. L. & N.*, 129 Ala. 237, a cause of action is not presented in this character of pleading, unless the complaint showed that plaintiff was a passenger, that while a passenger plaintiff was deprived of some right to which she was entitled, and suffered injury therefrom, and that the railroad company operates through the corporate limits of an incorporated town or city of more than a thousand inhabitants.—Sec. 5489, Code 1907; *Melton v. B. R. L. & P. Co.*, 45 South. 151; 6 Cyc. 542. The true principle is expressed in the case of *Mont. St. Ry. v. Warren*, 133 Ala. 526; 39 Pa. S. C. 204; 69 L. R. A. 519; 17 L. R. A. (N. S.) 510; 33 Atl. 1076; 25 Cyc.

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163. It cannot be said that the complaint stated a good cause of action for willful or wanton wrong.—*B. R. & E. Co. v. Bowers*, 110 Ala. 328; *So. Ry. v. Bunt*, 131 Ala. 591; *C. of Ga. v. Freeman*, 134 Ala. 354; *A. G. S. v. Cardwell*, 172 Ala. 282; *Goodloe v. M. & C. R. R. Co.*, 107 Ala. 233.

SAYRE, J.—Section 5489 of the Code of 1907 makes it the duty of every person, company, or corporation, owning or operating any railroad through the corporate limits of any incorporated city or town of more than 1,000 inhabitants, to establish and maintain one or more depots for the accommodation of passengers and storage of freights. This court held on good authority in the case of *Page v. L. & N. R. R. Co.*, 129 Ala. 232, 29 South. 676, that no such duty exists, unless imposed by the charter of the railroad company, or by statutory regulation, or by some other legislative authorization conferring power upon the Railroad Commission to impose the duty.

The complaint in this case seems to have been drawn with the idea that the section of the Code to which we have referred lay at the foundation of the cause of action the pleader was attempting to state. But we think the statute has nothing to do with the case. If defendant built a station house and waiting room at a place where it was not required, by the terms of the section or the mandate of the Railroad Commission, so to build, that fact evidenced sufficiently its appreciation of the reasonable needs of the traveling public at that point; and, as long as a waiting room is there kept and maintained, the railroad company will not be heard to say that its provision for the convenience of passengers is a mere gratuity which it may capriciously deny to any particular passenger. Whether the waiting room at Albertville was provided in obedience to an express com-

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mand of the law, or whether because defendant voluntarily recognized the reasonable needs of its passengers at that point, the question in either case is whether, in the other circumstances stated in the complaint, plaintiff had a right to stay in the waiting room.

As will be seen by reference to the complaint, plaintiff complains that, after she had traveled as a passenger on defendant's train, and after, so far as the operation of the train involved her safety, she had been safely deposited at her destination, she was denied the shelter of defendant's waiting room under circumstances which called, as any one would say, for the offices of good neighborhood at least. The question of judicial interest is whether, in view of the facts averred, defendant failed in any legal duty it owed plaintiff.

In the *Cyclopedia of Law and Procedure* a rule is stated as follows: After the passenger has departed from the car and has had reasonable time and opportunity to avoid further danger from the operation of the car, or further necessity of relations with the servants of the carrier, he ceases to be a passenger and stands toward the carrier as one of the general public."—6 Cyc. 542. Attention to the cases cited to the text will show that the rule was formulated with reference to street railroads which, as a general thing, deposit their passengers, not upon the carrier's property, but upon the public streets. The rule of this court in such cases may fall within the implications of the quoted text, but it may be well to say that our decisions hold that the duty of a street railway carrier is not performed when it lands its passenger at a time and at a place of such unknown environment to him that, in his first effort to depart after alighting, he walks into unknown danger.—*Montgomery St. Ry. Co. v. Mason*, 133 Ala 508, 32 South. 261.

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In the case of steam railways, which customarily land their passengers at appointed depots or station houses, and on their own premises, the rule is stated thus: "The relation of carrier and passenger does not cease at the moment the passenger alights from the carrier's vehicle, by its invitation, at a place selected by the carrier at the point of destination, but continues until the passenger has had a reasonable opportunity to leave the carrier's premises in the proper manner and by the route usual and proper in such cases."—5 Am. & Eng. 499. Virtually this statement of the law had the approval of this court in *Southern Railway v. Nelson*, 148 Ala. 90, 41 South. 1006, and in *Melton v. B. R. L. & P. Co.*, 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467, the last, however, being the case of a passenger on a street railway.

Most of the counts, all but the sixth and last, allege only that defendant's agent ordered and commanded plaintiff to quit the waiting room and defendant's premises "before she had reasonable time to proceed on her journey some distance out in the country," but what the pleader meant by "reasonable time" is made clear enough by the context, where the attendant circumstances are alleged. The gist of these counts is, not that plaintiff was denied the right and opportunity to depart, nor that there was an interference with her, nor any lack of due provision for her unless that is to be inferred from the facts stated, to wit, she was a woman, she was old, the weather was inclement, and she was not prepared to proceed upon her journey. These counts very clearly, though inferentially, reveal the pleader's opinion and conclusion that the special circumstances alleged, without more, clothed plaintiff with a right to stay for a length of time which, but for the special circumstances alleged, would have been unreasonable. De-

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defendant's contention, on the other hand, seems to be that, since plaintiff was a departing passenger, its definite duty, after safely landing her, was only to afford her a way of departure, safe so far as concerned the condition of defendant's premises and the operation of its trains, and that her age and sex, and the inclemency of the weather into which she was made to go, had no effect by way of enlarging her correlative right, or, to state it with a nearer view to the precise issue raised by the facts alleged, it is that defendant was under no duty, notwithstanding the special circumstances alleged, to give plaintiff shelter while she made arrangement for the further prosecution of her journey away from defendant's depot.

Generally speaking, the relation of carrier and passenger has its origin in a contract by which the carrier assumes to do no more than to carry the passenger between agreed points, and we must assume that such was the case here. The duty to care for the passenger's comfort and safety is raised by law. It lasts only while the relation lasts. Universally it is held that if a person goes to the carrier's station at a reasonable time, with the bona fide intention to take passage, he thereby imposes upon the carrier the duty of providing for him a safe way of ingress to and egress from its cars and a safe waiting place.—*L. & N. R. R. Co. v. Glasgow*, 179 Ala. 151, 60 South. 103. In certain cases the statute to which we referred in the beginning makes it the duty of the carrier to establish and maintain depots for the accommodation of passengers, and the nature of the comforts and conveniences to be provided in connection with waiting rooms in all cases may be inferred from section 5484 of the Code. But the literal command of the last-mentioned section is that every railroad company shall, when required by the Railroad

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Commission, provide waiting rooms "for passengers waiting for trains," and upon this language appellee seizes as indicative of the legislative understanding that waiting rooms are not required for the safety and convenience of departing passengers. And upon the language of this statute and, it would seem, upon the strict legal rights of the owners of private property, as against trespassers, the argument is, in short, that departing passengers need not be allowed to wait, but may be required to go.

We would say that appellee has correctly conceived its rights and duties in the ordinary case of a passenger who, having been landed at his destination, has nothing to do but to proceed upon his journey by other ways. In such case the carrier, in the absence of special conditions, to the statement of which we will shortly come, has discharged its full duty. It need have no concern about the passenger's further journey, and in consequence is under no legal duty to house the passenger while he makes preparation therefor. In the absence of actual notice to the contrary, the carrier may assume that the passenger has made his own preparations and is physically able to go. In such case the relation of carrier and passenger has ceased, and upon the carrier as such the law imposes no further obligation.

But it does not follow that occasions may not arise in which the carrier may owe a duty to one who lingers upon its premises. There is a law of necessity which operates for the conservation of human life and safety without regard to relations that may be established by contract. It may become necessary that one who has been a passenger shall stay in order to save himself from grievous bodily harm; and, in the determination of the carrier's duty to a person so circumstanced, it is

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not unimportant to consider, as affecting the degree of care to be exercised, that in the beginning he was not a trespasser. In such a situation the carrier's duty to exercise care for the safety of such person is commonly recognized and placed by the courts on the ground of an ineluctable legal duty which has regard, not for considerations merely sentimental or ethical, but for human life and safety. "There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses."—*Ploof v. Putnam*, 81 Vt. 471, 71 Atl. 188, 20 L. R. A. (N. S.) 152, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151, where a number of examples may be seen. The doctrine of necessity applies with special force to the preservation of human life. This last manifestation of the doctrine has frequently appeared in cases involving the expulsion of persons improperly on moving trains. It is uniformly held that the right of the carrier to expel trespassers from its trains must be exercised with due regard for the safety, the life, and health of the person removed, and this, whether he be a bare trespasser, or was misled into his wrongful position.—*Texas Midland R. R. Co. v. Geraldson*, 103 Tex. 402, 128 S. W. 611, 29 L. R. A. (N. S.) 799; *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485; *Adams v. Chicago Great Western R. R. Co.* (Iowa) 135 N. W. 21, 42 L. R. A. (N. S.) 373. In the last case it was said that the foundation of liability in such case is not a want of authority over one's premises, nor a want of authority to expel an intruder but it rests upon the fact that the person expelled is known to be in a condition which renders him incapable of taking measures for his own safety. It

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results that, if a passenger falls sick or his condition is such that to go at once would endanger his health or safety, there is no rule of law which would justify his summary ejection. In such case he must have an opportunity to get help or make other provision for the further prosecution of his journey, and such opportunity cannot be limited to that reasonable time which a passenger has to leave the carrier's premises in the ordinary case. It must be reasonable in view of the unusual and unavoidable conditions and the probable consequences of an immediate eviction. And, we hardly need to say, the carrier must have actual notice of the conditions, and so of the probable consequences.

Referring to the several counts of the complaint, it will be seen that the other counts were bad, but that, while the pleader probably proceeded in part upon an erroneous theory of the law of his case, in the sixth count he stated a good case within the principles we have asserted, though incumbering his statement with irrelevant and unnecessary matter. The demurrer, therefore, as for any objection which it specified as to count six, should have been overruled.

Reversed and remanded.

MCCLELLAN, MAYFIELD, and SOMERVILLE, JJ., concur. ANDERSON and DE GRAFFENRIED, JJ., concur in the reversal on count 6. DOWDELL, C. J., not sitting.

[Nashville, C. & St. L. Railway v. Crosby.]

Nashville, C. & St. L. Railway v. Crosby.

Injury to Passenger.

(Decided June 5, 1913. Rehearing denied June 30, 1913.
62 South. 880.)

1. *Carriers; Passengers; Duty to Protect.*—While it is the duty of a common carrier to protect its passengers against violence, whether from its servants or strangers, the liability of the carrier to protect from the misconduct of others arises only when the wrong is actually foreseen in time to prevent the misconduct, or is of such a nature and perpetrated under such circumstances that it might reasonably have been anticipated.

2. *Same.*—The duty to protect passengers is not confined to the carrier's vehicle, but extends throughout the continuance of the relation.

3. *Same.*—The degree of care required of a carrier to protect its passenger varies with time and place; a high degree of care being required while the passenger is on the vehicle, and only ordinary care while the passenger is waiting at the carrier's station.

4. *Same.*—Where a known officer of the law in the apparent exercise of his official authority disturbs the peace and personal security of a passenger, it is not the duty of the servants of the carrier to interfere unless the conduct of the officer is known to be illegal.

5. *Same.*—A carrier's servants are not bound to inquire whether an officer is acting officially and with lawful authority where such person is known to be an officer of the law invested with general authority, and acting under such apparent authority, arrests and searches the person of the passenger.

6. *Same.*—Where a passenger is disturbed by a servant of the carrier while engaged in some service the carrier's liability is grounded upon the breach of an absolute duty rather than on that of negligence.

7. *Same; Action; Pleading.*—In an action against a carrier for damages caused by reason of an illegal search of a passenger upon its premises, the complaint must state facts sufficient to show that the servants of the carrier should have intervened to protect the passenger, that is to say, a knowledge of the intended wrong, or reasonable grounds to anticipate it in time to interfere with its execution.

8. *Same; Jury Question.*—Where a plaintiff illegally searched on defendant's railway premises after she had begun her journey, went with an officer of the law first to the waiting room, and then to the freight room where she was searched, her failure to object or protest was not, as a matter of law, a consent to the search; that being a question for the jury under the evidence.

9. *Same; Evidence.*—The evidence examined and held insufficient to show that the servant of defendant knew that plaintiff was about

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to be assaulted or searched by the woman who claimed to have lost a watch, and who caused the search.

10. *Same; Variance.*—The fact that the servant of defendant said to the officer, "Search her in the freight room," does not constitute a variance as the language could not be construed as an instruction to make the search, but merely a direction as to the place and in response to the statement of the officer that plaintiff was accused of stealing a watch, and also as tending to show a knowledge of the search.

11. *Same; Illegal Search; Defense.*—Where the servants of the carrier participated in the illegal search of a passenger, the carrier is liable for assault and battery although the servant believed the search to be legal.

12. *Same.*—Where a peace officer did not request the servant of defendant railroad company to assist in searching plaintiff, the acts of the servant in participating in the illegal arrest and search cannot be excused on the idea that an officer may require assistance even in making an illegal arrest.

13. *Same.*—Where the action is by a passenger for damages for a failure of the servant of the carrier to protect her from an illegal arrest and search, the burden is on the passenger to show knowledge, on the part of the servant that the search which was made by the officer was illegal.

14. *Same; Evidence; Sufficiency.*—The evidence examined and held insufficient to show that the servant of defendant knew of the illegality of the action of the officer.

15. *Pleading; Anticipating Defenses.*—It is not necessary for a complaint to anticipate defenses; therefore, in an action against a carrier because of an illegal search of a passenger upon its premises, the complaint need not aver that the search was made by an officer of the law.

16. *Appeal and Error; Harmless Error; Instruction.*—The improper overruling of a demurrer to those counts of the complaint which fail to show that the carrier had knowledge of the proposed search in time to protect the passenger was harmless where other counts sufficiently alleged such knowledge and the instructions given made such knowledge a condition precedent to such recovery.

17. *Witnesses; Impeachment.*—Whether a witness voluntarily testified for a defendant is a proper inquiry on cross-examination.

18. *Trial; Argument of Counsel; Objection; Sufficiency.*—Where only a part of the statement made by counsel for plaintiff in argument was improper as being without support in the evidence, an objection to the whole statement was properly overruled as the attention of the court should have been directed to the part not supported in the evidence, and such objection should be promptly interposed.

19. *Charge of Court; Argumentative.*—Argumentative charges are properly refused.

20. *Same; Abstract.*—Charges predicated on matters concerning which there is no evidence should be refused as being abstract.

(Sayre, J., dissents in part.)

[Nashville, C. & St. L. Railway v. Crosby.]

APPEAL from Gadsden City Court.

Heard before Hon. JOHN H. DISQUE.

Action by Mrs. Dora Crosby against the Nashville, Chattanooga & St. Louis Railway for damages for injuries to her while a passenger. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint contains five counts, each of which shows that plaintiff, a woman, had become a passenger by the purchase of a ticket for transportation over defendant's line, and that while in defendant's station at Albertville, awaiting the arrival of the train she was assaulted and beaten and her person searched for a watch alleged to have been stolen.

The first count alleges that defendant negligently allowed and permitted one R. L. Amos to assault and beat the plaintiff and to lay violent hands on the plaintiff and to search her against her will for a watch alleged by said Amos to have been stolen, and also that defendant's agent at Albertville, Ala., to wit, Robert Whitman, knew of the assault and mistreatment of plaintiff by said Amos and failed and refused to protect the plaintiff against said assault and mistreatment, although plaintiff called upon said Whitman and appealed to him to protect her against the same.

The second count is substantially the same as the first, but omits any allegation of notice to or knowledge by the defendant or its agents of the alleged mistreatment and of plaintiff's appeal to Whitman for protection.

The third count charges that one Whitman, who was then and there the station or depot agent of defendant, and one R. L. Amos did assault and beat the plaintiff and search plaintiff for a watch which was alleged to have been stolen; and further that said assault, battery, and search of plaintiff was permitted by defendant and

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was committed by its said agent and the said R. L. Amos in breach of its duty to plaintiff.

The fourth count charges that defendant negligently allowed or permitted one Mrs. M. V. Sims to assault and beat the plaintiff and to search her against her will for a watch alleged by the said Mrs. Sims to have been stolen, and further charges that the agent Whitman knew of and failed to protect her at her request, in the language used in count 1.

The fifth count is the same as the fourth, but omitting any allegation of notice to or knowledge by defendant or its agent of the alleged mistreatment and of plaintiff's appeal to Whitman for protection.

Defendant filed a demurrer to each of the counts of the complaint and to each count thereof separately and severally, setting up a number of grounds, including the following:

"(9) Said complaint fails to show that the said depot agent knew or by the exercise of reasonable diligence should have known, that the said assault and battery was unlawful.

"(10) Said complaint does not show that any servant or agent of defendant knew, or by the exercise of reasonable diligence should have known, that the said search was unlawful in time to have prevented said search.

"(11) Said complaint does not show that any servant or agent of defendant could have prevented the said assault and battery or the said search."

These demurrers being overruled, the defendant filed the general issue and six special pleas, the substance of which is shown by the following:

"(4) That the matter complained of in the complaint consisted in a search of plaintiff's person by R. L. Amos, who was then acting as the marshal of the town of

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Albertville, for a watch claimed to have been stolen, and search was not caused or participated in by defendant or any agent or employee of defendant.

"(5) That the matter complained of in the complaint consisted of plaintiff being taken into custody and searched by one R. L. Amos, who was then acting as an officer of the law, and without the suggestion, assistance, or connivance of defendant or any agent or employee of defendant."

"(8) That the only basis in fact for this suit is that plaintiff was searched by one Mrs. M. B. Sims and one R. L. Amos for a watch, and this search was made at the instance and request of the plaintiff, and not otherwise."

Plaintiff's demurrers to the special pleas were overruled, and issue was joined on said pleas and the jury found by their verdict for plaintiff in the sum of \$7,000. The evidence shows without dispute that R. L. Amos, the town marshal of Albertville, while standing near the station was informed by Mrs. Sims of the loss of a watch from a room in which plaintiff had been staying, and that suspicion pointed to her as the guilty party. Mrs. Sims was accompanied by her brother-in-law, Dr. Irvin, and all three of them proceeded to the station, and Amos entered the waiting room where plaintiff was. According to the testimony of Amos, he then said nothing to the agent Whitman, but at once approached plaintiff and told her he wanted to see her privately, whereupon she willingly walked around to the freight room with him; Mrs. Sims and Dr. Irvin accompanying them. Finding other persons in the freight room, they went back around to the colored waiting room, entered, put other persons out, closed the door, and then discussed the stolen watch. Prior to going to the freight room Amos had requested

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of Whitman the privilege of using that room for a private conversation with plaintiff, to which Whitman consented; and before going to the colored waiting room for the same purpose Amos again asked Whitman for the use of the waiting room, receiving his assent. In the waiting room plaintiff was search first by Mrs. Sims and then by Amos; Dr. Irvin being present. The testimony of all three is that plaintiff expressed a perfect willingness to be searched, while plaintiff testified that she did not consent and was objecting all the time. Mrs. Sims, Dr. Irvin, Whitman and two other witnesses corroborate Amos in the statement that Whitman had nothing to do with directing the search and in no way participated in it. Plaintiff testified that when Amos first entered the waiting room he whispered with Whitman, who said, "Bob, take her in the freight room and search her," and that while there she told Whitman she had bought her ticket and called on him to protect her, at the same time denying that she had taken the watch. She is corroborated by two witnesses and is contradicted by Whitman, Amos, Irvin, and Mrs. Sims. Amos states that he was not acting in this matter as an officer of the law, but there is nothing tending to show that Whitman was aware of this fact. Amos did not arrest plaintiff, and Whitman had no reason to believe that an arrest had been made. It is shown without dispute that plaintiff was innocent of any offense in relation to the watch, and that the search was wholly illegal, if not consented to by plaintiff. The following charges were refused the defendant:

"The court charges the jury that if they find from the evidence that plaintiff, after hearing defendant's station agent say to Amos, a policeman, to take her in the freight room and from there to the colored waiting room, or words to that effect, went without objection

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or protest with said Amos to the freight room, then from there to the colored waiting room, then the verdict should be for the defendant.

“(8) The court charges the jury that if the matter complained of in the complaint consisted of plaintiff’s arrest, and her search by one R. L. Amos, who was then and there an officer of the law, to wit, the marshal of Albertville, plaintiff cannot recover in this case, and the verdict of the jury must be for the defendant.”

GOODHUE & BRINDLEY, and DORTCH, MARTIN & ALLEN, and SPRAGINS & SPEAKE, for appellant. Negligence will not be presumed, but its existence must be shown when it is charged.—Jones on Evid. 1. Therefore, the court should have given the general charge as to counts 4 and 5.—*B. R. L. & P. v. Randall*, 149 Ala. 543; *L. & N. v. Markee*, 103 Ala. 169. Because of a variance the court erred in not giving the general charge as count 3.—130 Ala. 346; 60 L. R. A. 715. The verdict was contrary to the evidence and the charge of the court, and the court was in error in declining to set it aside.—73 Ala. 248; 116 Ala. 149; 158 Ala. 112; 56 South. 134. It was not the servant’s duty to interpose any opposition to plaintiff being searched by Amos, who was then and there a known officer of the law, nor was there any duty on the carrier to inquire into his authority.—3 A. & E. Ann. cases, 255; 117 Ga. 63; 159 Pa. St. 148; 82 S. W. 524. On these authorities last cited the court erred in that part of his oral charge which was excepted to. It was error to permit it to be shown that Dr. Heard came to court without a subpoena.—137 Ala. 504. The court erred in overruling defendant’s objection and motion to exclude arguments of plaintiff’s counsel in closing.—159 Ala. 51; 74 Ala. 389; 68 Ala. 485; 116 Ala. 150. In the light of all the above authorities it is insisted that

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the court erred in refusing the charges requested by defendant. It is the duty of bystanders to assist an officer when called upon to do so, and does not render the act of the bystander an assault and battery, although the officer is acting without authority.—3 Cyc. 1050; *Watson v. State*, 82 Ala. 60; 24 Vt. 69; 80 N. C. 273; 24 N. C. 50.

KNOX, ACKER, DIXON & STERNE, and O. R. HOOD, for appellee. Counts 1 and 4 were not susceptible of the construction sought to be placed upon them by appellant. Certainly, there was an arrest.—3 Cyc. 873. The affirmative charge should not have been given as to any counts of the complaint, as it does not appear that appellee assented or that defendant would have been relieved of liability had she done so. The verdict was not excessive.—42 Fed. 482; 44 Am. Rep. 152; 112 La. 817; 80 Me. 177; *Pullman Co. v. Lutz*, 154 Ala. 517. There was no variance between the proof and the allegation as to counts 4 and 5.—*Mobile R. R. Co. v. Glover*, 150 Ala. 386; *K. C. M. & B. v. Childress*, 132 Ala. 611; *White v. Haas*, 32 Ala. 430. No consent to the search is shown.—*McQuirk v. State*, 84 Ala. 437; 19 Cyc. 334. There was no error in the oral charge of the court.—*Alexander v. Smith*, 61 South. 68; *A. G. S. v. Sanders*, 145 Ala. 449. There was no error in permitting it to be shown that the witness came voluntarily and without a subpoena.—*Prince v. State*, 100 Ala. 144; *L. & N. v. Tegnor*, 125 Ala. 601; *Moore v. N. C. & St. L.*, 137 Ala. 495. The objection to the argument of counsel was to the whole and not to a part unsupported by the evidence, and hence, was properly overruled.—*L. & N. v. Hurt*, 101 Ala. 36; *B. R. L. & P. Co. v. Gonzales*, 61 South. 84. There was no error in the rulings on demurrer to the complaint.—*B. R. L. & P. Co. v. Gonzales*,

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supra; Ia. 127; 176 Pa. 628. A complaint need never negative a defense.—*Ga. Pac. v. Davis*, 92 Ala. 307, and authorities *supra*.

SOMERVILLE, J.—It is the duty of common carriers to protect their passengers against violence or improper conduct, whether on the part of its own servants or of other passengers or strangers; but the carrier's liability for failure to protect from the misconduct of others than its own servants arises only when the wrong is actually foreseen or is of such a character and perpetrated under such circumstances as that it might reasonably have been anticipated or naturally expected to occur.—*Batton v. S. & N. Ala. R. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80; *Britton v. A. & C. Ry. Co.*, 88 N. C. 536, 43 Am. Rep. 749; 6 Cyc. 604. It is of course a corollary to this rule of liability that the injurious misconduct complained of could have been foreseen in time to permit of its effective prevention.—*Id.*; *Montgomery Traction Co. v. Whatley*, 152 Ala. 101, 44 South. 538, 126 Am. St. Rep. 17.

This duty is not confined to the case of a passenger on a train or car but extends to the relation so long as it continues, at all times and places.—*Id.*; 6 Cyc. 600 (3).

Nevertheless, the measure of care varies according to time and place; and, while a very high degree of care may be required of the carrier with respect to passengers while actually on its trains or cars, only ordinary care is required as to passengers waiting at its stations, at least under ordinary conditions as they exist in this country.—*Batton v. S. & N. Ala. R. R. Co.*, *supra*.

In the recent case of *So. Ry. Co. v. Hanby*, *infra*, 62 South. 871, this subject was carefully considered by this court, and it was there said that "the duty of protection does not arise until such carrier * * * has

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reasonable grounds for believing that such violence or insult will occur unless steps are taken to prevent it."

It is also the rule that, when a known officer of the law, in the apparent exercise of official authority, and not exceeding the limits of his customary functions, disturbs the peace and personal security of a passenger, it is not the duty of the carrier or its servants to intervene for the protection of the passenger.—*Bowden v. A. C. L. R. R. Co.*, 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, and note; *Owens v. Dilmington, etc., R. R. Co.*, 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642; *Brunswick, etc., R. R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152; *Tex. Mid. R. R. Co. v. Dean*, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943; *Duggan v. B. & O. R. R. Co.*, 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672, 676. If the carrier's servant knows that the arrest or search is illegal, it would doubtless be his duty to make inquiry into the matter and to make seasonable and suitable protest for the protection of the passenger. But it would be contrary to good order and sound policy to require the carrier's servant to forcibly contest with an officer the rightfulness and propriety of his action in making an arrest, or a search, unless, perhaps, it is accompanied by palpably abusive and improper treatment not germane to his official acts.

But where the arrest or search is made by a known officer who is invested with the general authority to do such acts, the carrier's servant is under no duty to inquire whether he is in fact acting officially or with lawful authority in the particular case. He may assume these things and is under no duty to interfere with the officer.—*Tex. Mid. R. R. Co. v. Dean*, *supra*; *Duggan v. B. & O. R. R. Co.*, *supra*; *Brunswick, etc., R. R. Co. v. Ponder*, *supra*.

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When the injurious disturbance of the passenger is by the act of the carriers own servant while he is engaged in its service, and to whom is committed *some part* of its duty with respect to the custody and safe carriage of its passengers, the carrier's liability is not grounded on the theory of negligence nor upon the assumption that the act is within the scope of the servant's authority or within the line of his employment, but rather upon the theory of the breach of an absolute duty resting on the carrier to see that its passengers are not injured by the servants to whose care or custody they have been committed or exposed.—*B. R. & E. Co. v. Baird*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43; *Tex. Mid. R. R. Co. v. Dean*, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943; *Dwinelle v. New York, etc., R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Gillingham v. O. R. R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; 4 Elliott on Railroads (2d Ed.) § 1638.

With this statement of the general principles applicable to the facts of this case, we proceed to a consideration of the particular question presented by the record.

It is not necessary for the complaint to anticipate defenses and allege that the assault or search was illegal or not made by an officer of the law, and the several grounds of demurrer predicated on that theory are without merit.

It is, however, necessary for each count of the complaint, charging that defendant negligently allowed or permitted a stranger to assault and beat or search plaintiff, to allege a state of facts upon which the duty of protection or intervention would arise, viz., a knowledge by defendant of the intended wrong, or reasonable grounds to anticipate it, in time to prevent or inter-

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fere with its execution. In this respect the second and fifth counts of the complaint are fatally defective, and the several grounds of demurrers pointing out the defect were well taken and should have been sustained.—*So. Ry. Co. v. Hanby*, *infra*, 62 South. 871; *Ensley Ry. Co. v. Cheurning*, 93 Ala. 24, 26, 9 South. 458.

Nevertheless, the error was without prejudice to appellant, since other counts sufficiently alleged knowledge by or notice to Whitman, defendant's responsible agent; the issue was contested by full evidence on both sides; and the trial court fully and clearly instructed the jury, both *ex mero motu* and in writing at defendant's request, that defendant's agent, Whitman, "was under no duty to interfere for the protection of the plaintiff unless he knew or had reasonable cause to believe that she was threatened or about to be subjected to an unlawful assault upon or search of the person"; and further "that, if the evidence in the case does not reasonably satisfy them [the jury] that defendant's station agent, Whitman, directed or suggested the search of the plaintiff, and that plaintiff did not ask or call on him to protect her from being searched, then the verdict should be in favor of the defendant;" and more directly still that, "if they believe from the evidence that defendant's station agent, Whitman, did not suggest, direct, or in any manner participate in a search of plaintiff's person, then their verdict should be in favor of defendant." These instructions, in substantially similar form, were repeated over and over, and in fact the only issue they submitted to the jury was the single question of Whitman's affirmative participation in the alleged search.

There was no error in allowing plaintiff to show, on the cross-examination of one of defendant's witnesses, that he came to court to testify for defendant volunta-

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rily; i. e., without the compulsion of a subpœna. Although that fact might ordinarily be of small significance, yet it may sometimes indicate abnormal zeal or interest on the part of the witness, and it is the practice to allow it to go to the jury for what it may be worth.—*Wabash R. R. Co. v. Ferris*, 6 Ind. App. 30, 32 N. E. 112; 40 Cyc. 2684, and cases cited.

In his closing argument to the jury one of plaintiff's counsel stated that "Mrs. Wakefield was a sister-in-law of Whitman, the agent, and that (the missing watch was found in Mrs. Wakefield's house)." The bill of exceptions recites that "defendant objected to the foregoing statement of plaintiff's counsel and moved to exclude it from the jury, and the court overruled defendant's objection and motion to exclude and allowed said statement to remain with the jury," to which defendant duly excepted. That part of the statement in parenthesis was not a fact in evidence, but the other part of it was. The objection to the *whole* statement was properly overruled.—*L. & N. R. R. Co. v. Holland*, 173 Ala. 675, 55 South. 1001; *L. & N. R. R. Co. v. Hurt*, 101 Ala. 35, 13 South. 130.

It should affirmatively appear that the objection was interposed promptly upon the making of the objectionable statement, and the court's attention should have been called to the absence of evidence to support it.—*B. R. L. & P. Co. v. Gonzales, infra*, 61 South. 84.

Charge 7 refused to defendant is argumentative and does not state a correct proposition of law. Although plaintiff may have gone with Amos to the freight room and afterwards to the colored waiting room, "without objection or protest," this was not, as matter of law, a consent by her to the search of her person by Amos or Mrs. Sims. If the agent Whitman instructed Amos, whom he knew to be an officer, to take her to those

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places and search her, her submission might well have been produced by the duress of her situation and the apparent power and authority of Amos and Whitman. It was clearly for the jury to say on all the evidence whether plaintiff in fact consented to the search or not.

Charge 8 refused to defendant is predicated on the fact of an arrest of plaintiff as a preliminary to the search of her person. It will suffice to say that the undisputed evidence affirmatively shows that plaintiff was not arrested at all, and, the charge being abstract in this essential particular, it was properly refused.

The trial court refused to give for defendant the general affirmative charge on the whole complaint and on each separate count, as separately requested in writing by defendant.

The argument in favor of the conclusion of error in these refusals is: (1) That as to counts 4 and 5 there is no evidence tending to show that the agent Whitman knew, or had reason to believe, that plaintiff was being or was about to be assaulted or searched by Mrs. Sims; (2) that as to these same counts there is a fatal variance between pleading and proof, the one being for *negligently allowing* the wrong, and the other showing *actual participation*, if anything at all; (3) that as to the whole complaint the evidence shows that plaintiff consented to the search; (4) that whether she consented to the search or not, she was under arrest in the hands of a known officer of the law at the time she was searched, and hence beyond the reach of defendant's ordinary obligation to protect her; and (5) that in the absence of knowledge that the arrest was illegal, Whitman might have lawfully assisted the officer in making it, though it was in fact illegal. We will notice these contentions seriatim.

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1. It is certain that there is nothing in the evidence to show a knowledge by Whitman of an intended search of plaintiff *specifically* by Mrs. Sims. Nor is there anything in the evidence to show that Whitman knew of the search by Mrs. Sims while it was being conducted, or to show that plaintiff appealed to Whitman to protect her against it. Plaintiff's counsel insist that Whitman's knowledge may be fairly inferred from the fact that Mrs. Sims was with Amos and plaintiff when they went to the freight room, and also when they came back and Amos requested of Whitman the use of the waiting room, and also from the fact that the ticket window between Whitman's office and the waiting room was open; that Whitman passed by the window several times and saw Amos' party once through the aperture; and that he *could have seen* all that was going on. But the mere presence of Mrs. Sims with the party might as well have suggested to Whitman that she was the companion and friend of plaintiff and seeking to befriend and protect her as that she was abetting the purpose of Amos to search her. And so the fact that Whitman might have seen the search of plaintiff by Mrs. Sims through the ticket window, had he approached it and looked through just at the time of the search, has no tendency to show that he in fact did so. Plaintiff herself does not affirm that she saw him do so; Dr. Irvin says he did not see him at the window during the search, though it was in the range of his vision; and Whitman says he did not see the search and knew nothing about it. His knowledge that Amos was going to search plaintiff, and that Mrs. Sims was going to be present, was not sufficient to warn him that Mrs. Sims would also make a search.

It is clear to our minds, under the evidence adduced, that plaintiff had no right of recovery at all unless the jury believed the testimony of her and her witnesses

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that Whitman ordered Amos to search her. And of course, if Mrs. Sims made a search under the direction and authority of Amos, that might well be regarded as the proximate result of Whitman's original wrong and as being in fact a search by Amos himself and through Amos by Whitman. But plaintiff has elected by her pleadings to treat Mrs. Sims' search as an independent wrong, anticipated or known *as such* to defendant through its agent Whitman. The evidence did not sustain this phase of her complaint, and the trial court should have instructed the jury that they could not find for plaintiff on the fourth count.

2. There is no merit in the theory of a variance in the aspect suggested, since the jury might have interpreted Whitman's alleged language to Amos as a mere designation of the place in which he might make the search and not as an *instruction* to make a search. Thus interpreted, it simply imported Whitman's knowledge of the impending search, and hence showed his opportunity and his duty to prevent it if practicable, assuming that he knew its illegal character. There is nothing, it is true, to indicate such knowledge on his part, and the interpretation suggested would, under the principles of law above enunciated, lead to the conclusion that plaintiff was not entitled to recover on any count of the complaint. Hence, although there was not necessarily a *variance* as to any of the counts, there was either a variance or a failure of necessary proof as to all counts but the third.

3. In discussing the refusal to give defendant's requested charge 7, we have already disposed of the theory that plaintiff's consent to the search was shown as matter of law. That was a jury question, pointedly so in view of plaintiff's positive testimony that she was objecting to it all the time.

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4. As already pointed out, the evidence affirmatively shows, without any dispute, that plaintiff was not arrested by Amos, and that Whitman did not even suppose that she had been arrested. Hence all of defendant's arguments based upon that theory are entirely without merit.

5. The search of plaintiff was confessedly illegal if made without her consent. If Whitman actually participated in it, he was guilty of a battery upon her, regardless of his belief as to its legality; and for such a battery the defendant carrier is absolutely liable.

The principle that exempts from liability one who at an officer's command assists him in making an illegal arrest, if applicable also to the making of an illegal search of the person, can have no protective operation here since it does not appear that Amos requested such assistance from Whitman.

Counsel for appellee have framed their argument upon the assumption that whether or not defendant's agent Whitman knew or believed that Amos was acting as an officer in his dealings with plaintiff was a jury question, or else that it was Whitman's duty, when apprised of those dealings, to make inquiry as to their official character and validity. These theories of the law are without merit, as already indicated, *supra*.

The duty of intervention by the carrier between a passenger and a known officer of the law does not arise until the carrier's servant is informed or has just reason to believe that the officer is not acting officially, or else that he is wrongfully acting *colore officii*. The burden is upon the plaintiff to show such knowledge, and it cannot be assumed. In the absence of evidence to show it, the plaintiff fails to show the initiation of the duty to intervene and protect her.

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In the instant case there is nothing to show such knowledge by Whitman, whether the testimony of plaintiff's or defendant's witnesses be taken as true. If plaintiff's own testimony is true, it tends to show merely that Whitman knew that she was accused or suspected of having stolen a watch, for which she was about to be searched by the officer. Her claim of innocence, and her appeal for intervention by Whitman, did not change the situation, so far as Whitman was concerned. Certainly none of these circumstances can support a rational inference that Whitman knew that the officer was acting either unofficially or wrongfully. These considerations lead to the conclusion heretofore stated that, as matter of law on the facts shown, plaintiff was not entitled to recover except upon the third count of the complaint, and only upon the finding of fact that the agent Whitman directed, instigated, or in some way affirmatively participated in the search of plaintiff without her consent.

It follows that the trial court erred in not giving for defendant the general affirmative charge upon each of the other counts of the complaint. The judgment will be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur. SAYRE, J., is of the opinion that the overruling of the demurrers to the second and fifth counts of the complaint was prejudicial error which would require a reversal of the judgment.

[Southern Railway Company v. Hanby.]

Southern Railway Company v. Hanby.

Injury to Passenger.

(Decided May 15, 1913. Rehearing denied June 19, 1913.
62 South. 871.)

1. *Carriers; Passengers; Duty to Protect.*—A carrier owes its passengers the affirmative duty to protect him from an assault by its servants, and no fault of the passenger, short of that producing necessity to strike in self-defense, will justify an assault by the carrier's servant or relieve the carrier from liability therefor; but where a passenger is assaulted on the carrier's premises by one not a servant of the carrier, the carrier's duty to protect the passenger does not arise until the carrier has reasonable grounds to believe that unless steps are taken to prevent it such violence or insult will occur, and at this time only is the carrier bound to interfere to save itself from liability for such damage.

2. *Same; Complaint.*—The complaint examined and it is held not sufficient to allege that the carrier knew, or from the attendant circumstances should have known of the threatened assault and battery on plaintiff by a stranger in time to have prevented the same, and therefore to be subject to the demurrers interposed.

3. *Negligence; Pleading.*—Where a complaint seeks recovery for simple negligence, it should definitely state the facts out of which the duty to act springs; this being properly stated, the negligent failure to perform the duty may be alleged in general terms.

4. *Pleading; Demurrers; Amendment; Waiver.*—Where the complaint was amended, after demurrer overruled, by striking the name of one of defendants, but not so as to change the part objected to by the demurrer, the failure to refile demurrer to the complaint as amended was not a waiver of the former ruling on demurrer.

5. *Same.—Construction of Complaint.*—The allegations of a complaint must be construed most strongly against the pleader when attacked by demurrer.

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

Action by S. M. Hanby against the Southern Railway Company for damages for injuries from an assault while a passenger. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 3 is as follows:

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"Plaintiff claims of defendant the Southern Railway Company, a corporation, and Lewis Malone, the sum of \$10,000 damages in this: That on and prior to the 20th day of December, 1906, the defendant Southern Railway was a common carrier of passengers by means of a railroad which ran through Jackson, Ala., having at said Jackson a station at which it received and discharged passengers as such common carrier aforesaid; that on, to wit, the above date, plaintiff went to the passenger station of the said Southern Railway Company at Jackson, Ala., for the purpose and with the intent to take passage on one of the passenger trains of the Southern Railway Company leaving Jackson over its said railroad, which said train was to leave within, to wit, 10 or 20 minutes thereafter; plaintiff paid for his transportation over the railroad of the said Southern Railroad to Thomasville, Ala., another station on said railroad, and obtained from the agent of defendant Southern Railway a ticket entitling him and authorizing him to be carried on defendants passenger train, leaving said station going from Jackson to Thomasville, and said company had contracted with plaintiff to carry him as a passenger on its said train from Jackson to Thomasville, which train was due to leave said Jackson within, to wit, 10 or 20 minutes after, and while plaintiff was waiting at said station for the purpose of taking passage on said train, and with the intention of taking passage on said train, he was set upon by a person or persons at defendant's said station and kicked, struck, beaten, knocked down, bruised, and had vile epithets applied to him, and plaintiff avers that it was the duty of defendant Lewis Malone, under his employment by defendant, to protect plaintiff, as it was also the duty of defendant Southern Railway Company to protect plaintiff from indignities, assaults, and batte-

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ries and other wrongs perpetrated upon him as aforesaid, and plaintiff avers that the defendants negligently failed to perform their duty to the plaintiff in that behalf, but negligently permitted him to be assaulted, beaten, bruised, and otherwise ill treated, by reason and as a proximate consequence of which he was caused to suffer (here follows catalogue of injuries) all of which said wrongs and injuries to plaintiff were known to said Southern Railway Company, and to said Lewis Malone, or would have been known by the exercise of such reasonable care and diligence."

The demurrers were as follows:

"Because said count fails to show wherein the defendant violated any duty which it owed to plaintiff, because, as a matter of law, the defendant Southern Railway Company is not liable for the act of its alleged agent Lewis Malone for the alleged acts referred to or described in said count. Said count does not sufficiently show that the plaintiff's injuries were the proximate consequence of the negligence of defendant, or of its alleged agent Lewis Malone. There is no absolute duty upon the part of the defendant Southern Railway Company to protect plaintiff against such assault or injuries as are set out in said count. It does not appear from the allegation of said count that the agent of defendant, Lewis Malone, while in the exercise of the performance of his duties for the Southern Railway Company, was charged with the duty of protecting the plaintiff from the insults and indignities set out in said count. From all that appears to the contrary in said count, the plaintiff was assaulted and beaten as alleged in said count by persons not in the employ of the Southern Railway Company, and not having any connection with it."

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J. T. STOKELY and R. H. SCRIVNER, for appellant. For former report see 57 South 334. Count 3 was not helped by the amendment, and was subject to the demurrer interposed.—*Hanby v. So. Ry.*, 52 South. 334; *Batson v. S. & N. A. Ry. Co.*, 77 Ala. 591; 47 L. R. A. 120; 23 L. R. A. (O. S.) 606. Counsel discuss the assignments of error relative to evidence, but without further citation of authority. The oral charge of the court submitted to the jury a question of law, and was hence, improper.—*City of Montgomery v. Bradley*, 48 South. 809. The affirmative charge should have been given as to count 3.—*B. R. L. & P. Co. v. Hunnicutt*, 57 South. 263, and authorities cited.

FRANK S. WHITE & SONS, for appellee. Having failed to refile the demurrers after the amendment, the appellant cannot now complain of the court's action thereon in the first instance.—*Ala. C. Co. v. Niles*, 106 Ala. 302. In any event, count 3 was sufficient.—*City D. Co. v. Henry*, 139 Ala. 161; *Armstrong v. Mont. St. Ry.*, 123 Ala.; *Moore's Case*, 151 Ala. 327; *Sweet's Case*, 136 Ala. 166; *McCurdy's Case*, 172 Ala. 490; *Baird's Case*, 130 Ala. 334; *So. Bell v. Francis*, 109 Ala. 231; 2 Hutchinson on Carriers, sec. 989; *Parker's Case*, 161 Ala. 248; *L. & N. v. Glasgow*, 60 South. 103; *Sanders' Case*, 97 Ala. 307. Exceptions to charges must come before the jury retires.—*Montgomery v. Gilmer*, 33 Ala. 116; *Moore v. State*, 40 South. 345. The court's oral charge is not objectionable when construed as a whole.—*B. R. L. & P. Co. v. King*, 149 Ala. 504; *Knight v. State*, 160 Ala. 63; *B. R. L. & P. Co. v. Cockrum*, 60 South. 308; *Mont. T. Co. v. Whatley*, 152 Ala. The court was unquestionably right in refusing the affirmative charge to defendant.—*L. & N. v. Glasgow*, *supra*; *N. Bir. Ry. v. Liddicoat*, 99 Ala. 545; 4 Elliott on Railroads, sec. 1579.

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DE GRAFFENRIED, J.—In the case of *Batton and Wife v. Smith & North Alabama Railroad Company*, 77 Ala. 591, 54 Am. Rep. 80, this court, quoting from *Britton v. Atlanta & Charlotte Railway Company*, 88 N. C. 536, 43 Am. Rep. 749, said: "The carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and, while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is its duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." In this same case this court said that the duty of a common carrier to a passenger while at a station awaiting the arrival of a train "ought not to be greater than that of an innkeeper, who is never held liable for trespass committed ordinarily by strangers upon the person of his guest."

In *Beale on Innkeepers and Hotels* we find the following: "It is a duty of a carrier to protect his passenger from injury, and of an innkeeper to protect his guest from injury to the best of his ability, by the use of reasonable means. The innkeeper must take reasonable steps to protect his guests."—*Beale on Innkeepers and Hotels*, § 174. An innkeeper owes to his guest the *affirmative* duty to protect his guest from an *unlawful* assault at the hands of a stranger, and from an assault of a servant not *lawfully* committed by such servant in resisting an act of violence—actual or reasonably apparent—at the hands of such guest. If an assault is committed by a servant of an inn upon the person of a

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guest in retaliation for an insult received by such servant at the hands of a guest, that fact, in a suit by the guest against the innkeeper for damages because of such assault, may be considered by the jury in mitigation of damages, but not as a complete bar to a recovery in the case. In the case of innkeepers (as in the case of common carriers) the fault of the guest short of producing a *necessity* to strike in *self-defense* will not justify an assault on the part of the *servant*, nor relieve the innkeeper from liability for his act.—*Alabama City, Gadsden & Attalla Ry. Co. v. Sampley*, 169 Ala. 373, 53 South. 142; *Birmingham Electric Co. v. Baird*, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43; Beale on Innkeepers and Hotels, § 172.

The above strict rule does not, of course, obtain when a passenger of a common carrier, or a guest of an inn, is assaulted and beaten, or insulted, by a person *not* a servant. In the latter case the common carrier, or innkeeper, owes his passenger or guest protection against the *lawless* violence of a stranger, but that duty of protection *does not arise* until such carrier or innkeeper has reasonable grounds for believing that such violence or insult will occur unless steps are taken to prevent it. When *that* occurs *then* the carrier or innkeeper must at once take all such reasonable steps as the circumstances will admit of to prevent the threatened injury or insult, and if he fails to do so, *then* he is liable in damages for the consequences. "The injury for which the carrier is liable must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated or naturally expected to occur."—*Fewings v. Mendenhall* (Minn. Sup. Ct.), 55 L. R. A. 713, note.

We quote, on the subject now under consideration, the following from appellee's brief: "Carriers are not

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only required to make and enforce reasonable regulations such as are necessary to protect their passengers from annoyance, insult, or injury on the train, but are required to make and enforce such reasonable regulations as are necessary to protect from annoyance, insult, or injury those who are invited to their depots or stations to become passengers. Failure to do so will make the carrier liable, *but in order to hold the carrier liable it must be averred that the station agent knew, or had the opportunity to know, that the injury was threatened.*" The italics in the above excerpt from the appellee's brief are ours, and if the italicized words "the opportunity to know" are stricken therefrom, and in their stead the words "had possession of facts which would have led a reasonable man to believe" are substituted, the above quoted excerpt, subject to the qualifications expressed in what follows in this opinion, is a correct statement of the law. It is also, of course, the law that if a passenger is suddenly assaulted by a stranger while in the station of a railroad company, it at once becomes the duty of the station agent, if he sees or becomes aware of the difficulty, to take all reasonable steps necessary to put an end to such difficulty, and if he negligently fails to do so, then the company is liable to the person so assaulted or beaten for any injuries which such passenger thereby unlawfully received at the hands of such stranger.

2. This case was tried upon the third count of the complaint as amended. To this count the appellant, the Southern Railway Company, filed a demurrer, which demurrer the trial court overruled. Just before the case was submitted to the jury the name of Lewis Malone, as one of the defendants, was, by amendment, stricken from this count and the appellant did not refile its demurrer to the count *after* this last amendment.

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Under the rule laid down by this court in *Birmingham Railway, Light & Power Co. v. Fox*, 174 Ala. 657, 56 South. 1013, the appellant has not, however, for that reason lost its right to assign as error the above action of the trial court in overruling its demurrer to said count 3 as first amended. "The rule is that if the pleading is amended so as to eradicate the part objected to by the plea or demurrer, or in an attempt to obviate the point taken by the plea or demurrer, the demurrant waives his right to review the ruling, unless he reinterposes his demurrer to the amended pleading and gets a ruling on same, but if the amendment does not relate to the point or defect taken by the demurrer or plea, but to some other or different matter or part of the complaint, the defendant does not waive his right to review the ruling made before amendment."—*B. R. L. & P. Co. v. Fox*, *supra*.

As the sufficiency of count 3 was tested by demurrer, we must, under our rules, take the allegations of the count most strongly against the appellee. So construed, the count charges an assault and battery upon appellee, while a passenger of appellant, by a *stranger* and *not* by a servant of appellant. The gravamen, therefore, of the count is the negligent failure of the appellant to protect appellee against an unlawful assault and battery at the hands of a stranger. In such cases the true rule seems to be that the carrier is not liable unless the agents or employees of the carrier "*knew*, or, in the *light of the surrounding circumstances, ought to have known*, that danger was threatened or was to be apprehended and *then* failed to use their authority and power to protect the passenger from the impending peril."—*Ball v. Chesapeake & O. R. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786.

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In the case of *Britton v. Atlanta & C. Air Line R. Co.*, 88 N. C. 536, 43 Am. Rep. 749, the Supreme Court of North Carolina said: "The liability of the defendant to the plaintiff grows, not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent."

In *Batton and Wife v. South & North Alabama Railroad Company*, *supra*, this court said: "The wrong or injury done the passenger by such stranger must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been *anticipated*, or naturally expected to occur."

It is, in effect, in the excerpt from the appellee's brief which we have above quoted admitted that, in a complaint seeking damages for such a wrong as we now have under consideration, it is *essential* that it shall be averred that the carrier knew, or from the attendant circumstances should have known, of the threatened injury *in time to have averted it* in order that a liability for such injury may be fixed upon such carrier. We have carefully parsed count 3, and we find in it no such averment. The count, it is true, as last amended concludes as follows: "All of which wrongs and injuries to the plaintiff were known to the said Southern Railway Company, or would have been known by it by the exercise of reasonable care and diligence." In the first place, the plaintiff (appellee) had no "wrongs and injuries" until after he was set upon and beaten. In the second place, when a count contains alternative averments, as in this case, the strength of the count, tested on demurrer, is to be determined by the allegations of the weakest alternative averment. The alternative averment "or would have been known by it by the exercise of reasonable care and diligence" is supported by

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no allegation of the complaint that, prior to the assault, *anything* had occurred to bring home to the railway company, or its station agent, knowledge that an assault upon the appellee was probably in the contemplation of any person whatsoever. In addition to this there is no allegation in the complaint that the knowledge of the railway company of the *threatened* injury set up in the count—if it be possible to treat the quoted portion of the count as imputing knowledge of a *threatened* assault—was obtained by the railway company *in time for it*, by the exercise of due diligence, to have prevented the injury so threatened.

It is a familiar proposition that when a complaint seeks a recovery on the ground of simple negligence, the complaint must show, *with definiteness*, the facts out of which the *duty to act* springs. *This* being done, the *negligent failure to perform the duty* may be alleged in general terms. Count 3 does not, with sufficient certainty, *set up facts* showing a *duty* on the part of the appellant to protect the appellee from the wrongs set up in the complaint. It fails to show, with sufficient certainty, that the appellant knew, or that the *attendant circumstances* were such that the appellant should have known, of the threatened battery upon appellee in time, by the exercise of due care, to have prevented it. The general allegation that appellant negligently failed to perform its duty to the appellee in the premises does not cure the defect. The count was subject to appellant's demurrer, and the trial court committed reversible error in overruling it.

The judgment of the court below must therefore be reversed, and the cause remanded to the court below for further proceedings in accordance with the views expressed in this opinion.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Alabama Great Southern Railway Co. v. Robinson.]

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Injury to Passenger.

(Decided June 3, 1913. 62 South. 813.)

1. *Carriers; Passengers; Injury; Complaint.*—A complaint alleging that while plaintiff was a passenger on defendant's road, in consequence of the negligence of defendant, owing to the door becoming fastened or obstructed, she was confined for considerable time in the small room in the coach, and as a consequence suffered the injuries alleged in her complaint, was made uncomfortable, annoyed and chagrined, that the attention of many people was called to the fact, that she was so confined, and that she was separated from her small children for a long time, sufficiently charged a breach of defendant's duty to carry her safely as a passenger.

2. *Same; Degree of Care.*—A carrier owes to its passengers the exercise of the highest degree of care, skill and diligence known to persons engaged in that business.

3. *Same; Evidence.*—Where the passenger testified that she made every effort to unfasten the door to the room in which she was confined, and there was also evidence that the porter, after entering the room through a window, prized off either the lock or the receiver, the evidence was sufficient to make it a jury question as to the negligence of defendant in failing to have the fastenings to the door in a safe and proper condition.

4. *Charge of Court; Degree of Proof.*—A charge asserting that if the mind of the jury was in a state of doubt or confusion as to plaintiff's right to recover, they should find for defendant, was properly refused, as under the charge, plaintiff was required to prove her case beyond the slightest doubt.

5. *Same.*—It is proper and advisable to refuse charges asserting that if the minds of the jury are in a state of confusion as to plaintiff's right of recovery, they should find for defendant, whether or not it was reversible error to give such charges.

(Mayfield, Sayre and Somerville, JJ., dissent in part.)

APPEAL from Birmingham City Court.

Heard before Hon. WILLIAM M. WALKER.

Action by Mrs. Laura B. Robinson against the Alabama Great Southern Railroad Company for damage for injury to her while a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

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The following is count 1: "Plaintiff claims of defendant \$5,000 as damages for that heretofore, to wit, on the 4th day of July, 1911, defendant was a common carrier of passengers for hire and reward by means of a train upon a railway from a point in Alabama, to wit, York, to another point in said state, to wit, Attalla; that on said day, while plaintiff was being carried by the defendant as its passenger on said train for hire and reward, accompanied by her three small children, and while plaintiff was defendant's passenger on said train, and said train was at a point on said railway between said York and said Attalla, in said Alabama, plaintiff, with one of her said children, to wit, a child two years of age, went into the toilet provided by defendant on the car in said train, on which car defendant was carrying plaintiff and said child as its passengers; that while plaintiff and said child were in said toilet the door or place of exit from said toilet became so fastened or obstructed as that plaintiff and said child were unable to leave said toilet for a long time, to wit, for several hours, and as a proximate consequence thereof plaintiff, who was far advanced in pregnancy, was made sore and sick, her health and physical stamina were greatly impaired, she suffered great mental and physical pain and anguish, was confined for a long time in a close and hot and small apartment, and was made very uncomfortable, and was greatly annoyed, chagrined, the attention of many people was called to the fact that she was confined in said toilet, and she suffered great inconvenience and annoyance, and mental and physical pain and anguish, and she was compelled to be separated from two of her small children for a long time. Plaintiff avers that defendant was guilty of negligence in or about carrying plaintiff as its passenger on the occasion aforesaid, and that as a proximate con-

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sequence of said negligence of defendant plaintiff was confined in said toilet for a great portion of said time on the occasion aforesaid, and was caused to suffer said injuries and damage."

Charges 1 and 2 refused to defendant were the general affirmative charge and the affirmative charge as to count 1.

"(16) The court charges, you, gentlemen of the jury, that if, after hearing all the evidence in the case, your mind should be in a state of doubt or confusion as to whether or not plaintiff was entitled to a verdict, then your verdict should be for the defendant."

A. G. & E. D. SMITH, for appellant. The court should have sustained the demurrer to the first count of the complaint as it fails to state wherein appellant neglected its duty in respect to the carriage of plaintiff as a passenger. The court erred in not giving the affirmative charge as to this count.—*M. & E. R. R. Co. v. Mallette*, 92 Ala. 209; *Ga. P. Ry. Co. v. Love*, 91 Ala. 432; *L. & N. v. Jones*, 83 Ala. 376. Plaintiff not only failed to meet the burden of proof, but failed absolutely to show any negligence on the part of the railroad in respect to the lock.—27 L. T. 762; 109 N. Y. 44. The court should have given charge 9, as it was based squarely on the issues. Charge 16 should have been given.—*B. R. L. & P. Co. v. Saxon*, 59 South. 584. The court should have granted a new trial.—*Fleming v. L. & N.*, 148 Ala. 527; *Neyman v. A. G. S.*, 172 Ala. 606.

HARSH, BEDDOW & FITTS, for appellee. Count 1 was not subject to the demurrers, but was in all respects sufficient.—*So. Ry. v. Burgess*, 143 Ala. 364; *B. R. L. & P. Co. v. Adams*, 146 Ala. 276; *Same v. Hagard*, 155 Ala. 343; *L. & N. v. Church*, 155 Ala. 329. Of course, defendant was not entitled to the affirmative charge.

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—*Craft v. Boston E. R. Co.*, 39 L. R. A. (N. S.) 880; *Chamberlain v. So. Ry.*, 159 Ala. 171; *A. C. G. & A. v. Appleton*, 54 South. 638; 19 S. W. 280; 77 Atl. 470; 67 S. E. 905; 67 Am. St. Rep. 872. Charge 16 was erroneous even under the *Saxon Case*, and its refusal was proper, as under it, plaintiff would have to prove her case beyond all doubt.

ANDERSON, J.—Count 1 of the complaint sufficiently charges the breach of duty owing the plaintiff as a passenger resulting from a negligent failure to safely carry her as a passenger as it had contracted to do. If she was imprisoned in the toilet provided for passengers on account of a defect in the lock or fastenings of the door so that she could not open said door, and she thereby suffered pain or discomfort, her injuries would as much result from a failure to safely transport her as a passenger as if she received physical hurt or suffered pain through any other source which constituted a breach of duty on the part of the defendant growing out of the relationship, and which said relationship called for the exercise, by the defendant, of the highest degree of care, skill, and diligence known to persons engaged in such business. The trial court did not err in overruling the defendant's demurrer to count 1 of the complaint.

Whether or not proof of the confinement alone would be sufficient to require the defendant to exonerate itself of negligence we need not decide, as the plaintiff not only proved her confinement in the toilet, but proved other facts from which the jury could infer that the defendant was guilty of negligence in failing to have the fastenings to the door in a safe and proper condition. She said that she made every effort to unfasten the door, and there was other evidence, growing out of

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the conduct of the trainmen in getting the same open, to create inferences for the jury that the lock or latch was defective, and that her failure to open same was not due to her mere ignorance as to how to manipulate the fastenings. The plaintiff says that the porter prized off the lock, while he admitted that he prized the receiver after getting to the toilet through the window. If the lock was in good working order and could have been opened in the ordinary way, it was a little singular that the porter prized either the lock or the receiver, and the fact that he resorted to force instead of the usual way to unfasten the door was not only a circumstance tending to show that the fastening was defective, but that the porter knew of same, else he would have attempted to open it in the ordinary way before prizing either the lock or receiver. The trial court did not err in refusing charges 1 and 2, requested by the defendant.

Charge 9, refused the defendant, was fully covered by charges 10, 15, and "A."

Charge 16, refused the defendant, was bad. It instructs for the defendant if the mind of the jury "be in a state of doubt or confusion as to whether or not the plaintiff is entitled to a verdict." The words "doubt or confusion" are disjunctive; and, if either existed, the charge requires a verdict for the defendant; the result is the jury could not, under said charge, find a verdict for the plaintiff if they entertained the slightest doubt as to her right to recovery. Their mind might be in a state of doubt, yet they might be reasonably satisfied that the plaintiff should recover. In other words, this charge, in effect, requires that the proof shall satisfy the jury beyond doubt, and that they must be absolutely positive as to the plaintiff's right to recover before they can find a verdict for her. Such a charge would

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be bad in a criminal case, wherein a greater degree of satisfaction is required of the jury than in civil cases. This charge is different from charge 6, held good in the *Saxon Case*, 179 Ala. 136, 59 South. 584, as there the word "confusion" was used alone, and not disjunctively with "doubt," as in the present case, and a state of confusion may perhaps be a different term than doubt. If their mind is in a state of confusion, they may not be reasonably satisfied, yet, if their mind be in doubt, they may still be reasonably satisfied, as the state of doubt may be very slight or may not be at all reasonable. While these cases can be differentiated, we think that the charge in the *Saxon Case* could have been well refused, as misleading, if not otherwise bad, as such charges are delusive and calculated to mislead the jury to the extent that they cannot find a verdict for the plaintiff, unless they are absolutely positive beyond a doubt that he is entitled to recover, and the law does not require such a belief or conviction on the part of the jury. The trial court might not be reversed for giving such a charge as charge 6 in the *Saxon Case*, *supra*, as it could be explained by counter instructions, but, as it is calculated to mislead the jury, trial courts should not be reversed for refusing same.

It was held in the case of *Brown v. Master*, 104 Ala. 464, 16 South. 443, that charges using the words "doubt or confusion" were bad. And in the case of *A. G. S. R. Co. v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65, a charge using the words "doubt" and "uncertainty" was condemned. In the case of *Calhoun v. Hannon*, 87 Ala. 283, 6 South. 291, the court held that charge 2 in said case was unobjectionable, though using the words "confused or uncertain," in the disjunctive. And in the case of *Marx v. Leinkauff*, 93 Ala. 453, 9 South. 818, it was held that the giving of such a charge

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was not error, citing the *Calhoun Case*, *supra*. It is evident, however, as noted in the case of *L. & N. R. R. Co. v. Sullivan*, 126 Ala. 95, 27 South. 760, that the charge in the *Calhoun Case*, *supra*, was treated as using the words conjunctively, and not disjunctively, as the writer of the opinion in the said *Calhoun Case* also wrote the opinion in the case of *Brown v. Master*, *supra*, wherein a distinction was drawn between it and the *Calhoun Case* by italicizing the word "or" in the charge in the *Brown Case*. This oversight was evidently due to the fact that in deciding the last case the opinion in the *Calhoun Case*, which used the words conjunctively, was relied upon, and the court did not examine the charge which used them disjunctively. The case of *L. & N. R. R. Co. v. Sullivan*, 126 Ala. 95, 27 South. 760, was dealing with charges containing the words "doubt, uncertainty and confusion" conjunctively, and the court only intimated that such a charge might be good if not faulty for another reason, and the court did not hold that it would be reversible error to refuse such a charge. Neither was it held in the *Calhoun* and *Marx* Cases, *supra*, that it was reversible error to refuse those charges, but this court declined to reverse the trial court for giving same. The result is that this court has condemned charges predicated upon a doubt or uncertainty whether used conjunctively or disjunctively, upon the theory that they required too high a degree of certainty upon the jury in finding for the plaintiff, yet a charge predicated upon a state of confusion alone, or when used conjunctively with doubt and uncertainty, one or both, seems to have been considered correct to the extent of holding that the giving of same was not reversible error. The *Saxon Case*, however, holds that the refusal of charge 6 was reversible error, and we think that said case was, to this extent, wrong and

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should be overruled. We now hold that charges predicated upon a doubt or uncertainty, one or both, are incorrect and should be refused. Charges predicated upon a "state of confusion in the mind of the jury" are little, if any, better, as the mind of the jury may be in some slight state of confusion, and yet they may be reasonably satisfied that the plaintiff should recover. Such charges can only muddle judicial waters, and confuse and mislead the juries to the belief that they cannot find a verdict for the plaintiff unless they are clear and positive beyond a doubt or uncertainty, in perhaps the slightest degree, that the plaintiff is entitled to a verdict, thus, in effect, putting upon plaintiffs in a civil suit a greater burden than the law puts upon the state in criminal prosecutions. It will be safe in the future for trial courts to refuse such a charge as it is calculated to mislead and confuse the jury. Whether or not the trial court would be reversed for giving such a charge we need not determine until the question presents itself, but which said question can be avoided by a refusal of same by the trial court. The case of *Saxon v. Birmingham R. R. Co.*, 179 Ala. 136, 59 South. 584, is expressly overruled in so far as it held that the refusal of the defendant's charge 6 was reversible error.

We are not prepared to say that the verdict was palpably contrary to the evidence, or that it was contrary to the charge of the court, notwithstanding the court charged that the burden of proof was on the plaintiff. Whether the burden was or was not on the plaintiff, as stated in the first part of this opinion, the plaintiff proved facts from which the jury could infer negligence on the part of the defendant.

The judgment of the city court is affirmed.

Affirmed.

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DOWDELL, C. J., and MCCLELLAN and DE GRAFFENRIED, JJ., concur.

MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur in what is said in the opinion, except as to the general charge requested by the defendant. They think the complaint good and that the criticism of the special charges is correct, and that the *Saxon Case* is properly overruled upon the point in question, but they do not think that any negligence was shown on the part of the defendant, its agents, or servants, and think that the case should be reversed.

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Injury to Passenger.

(Decided February 13, 1913. 61 South. 80.)

1. *Carriers; Passengers; Injury; Complaint.*—A complaint alleging that while plaintiff, a passenger, was in the act of alighting from a street car, it started forward with a sudden violent jerk, throwing her to the floor and injuring her, and that her injuries were proximately caused by the negligence of defendant in the negligent manner in which it ran and operated its car, was good as against the demurrers interposed.

2. *Same; Pleas; Sufficiency.*—Pleas alleging that while plaintiff was in the act of going from her seat to the door of the car, the car was in motion, that it was her duty to exercise reasonable care to support herself, but that she negligently failed to exercise such care, and that while standing in the aisle or on the platform while the car was in motion she negligently failed to support and maintain herself in a standing position, were not sufficient as an answer to an action for damages alleged to have been caused by a violent jerk of the car, as the passenger was preparing to alight, as they were susceptible of the construction that she failed to make use of the external supports afforded without alleging such facts as required such precaution, such as age or physical infirmity.

3. *Same; Instructions.*—A charge asserting that if plaintiff walked down the aisle of the car while the car was in motion, she assumed the risk of all proper and ordinary movements of the car, was not a

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proper charge as all of the testimony in the case showed that plaintiff was standing at the back of the car when injured, and there was no testimony tending to show that such passenger was injured while walking down the aisle.

4. *Same.*—Where there was no allegation of willful injury and the count for wanton negligence had been eliminated, the court properly declined to instruct the jury that if any individual juror was not reasonably satisfied from the evidence that plaintiff was negligently, wantonly or willfully injured, then the jury could not find for plaintiff.

5. *Negligence; Contributory Negligence; Plea.*—Pleas of contributory negligence are required to allege facts sufficient in themselves to show plaintiff's negligence as a legal conclusion, or to reasonably suggest it as an inference of fact, and in the last case, must color the equivocal facts by stating the conclusion that plaintiff's conduct was negligent.

6. *Same.*—Where the conduct of plaintiff is not negligent per se, and yet may be so by reason of his surroundings, pleas setting up contributory negligence under such circumstances must allege those circumstances as far as reasonably practicable.

7. *Appeal and Error; Showing Error; Exceptions.*—Where objections to improper remarks of counsel were made and overruled separately but only one exception is taken to all of the rulings, and some of the remarks are not improper or prejudicial, the exception cannot be sustained on appeal.

8. *Same.*—An objection to improper remarks of counsel without request for instructions to disregard such remark is not sufficient as a basis for an exception.

9. *Same; Burden of Showing Error.*—Doubtful recitals in the record will be construed most strongly against the exceptor, and will not be held to carry the burden on him of showing error.

10. *Trial; Argument of Counsel; Remedy.*—A ruling must be appropriately invoked, at once upon the utterance of such remark in order to put the trial court in error with the respect to improper remarks of counsel.

11. *Same.*—Where statements by counsel are objectionable only because they are of matters of fact not in evidence, the objections thereto should so state.

12. *Same.*—Remarks of plaintiff's counsel that millions of nickels and dimes went into the coffers of the street car company and to the stockholders, and that we give them valuable franchises, were improper in a passenger's action for injury, and upon proper request therefor, the jury should have been instructed to disregard them.

13. *New Trial; Grounds; Misconduct of Counsel.*—A new trial will be not granted because of improper remarks of counsel where the remarks are grossly improper and highly prejudicial, unless appropriate objection and appeal to the court for corrective action was made at the time of their utterance.

14. *Same.*—The remarks considered and held not so grossly improper or highly prejudicial as to require a new trial where appro-

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priate objections and appeal to the court for corrective action was not taken at the time.

15. *Same; Procedure; Assignment of Grounds.*—An assignment that certain improper remarks were made by a counsel without any allegation that they affected the jury and procured a verdict unfavorable to defendant, or excessive in amount, were insufficient as grounds for a motion for new trial.

(Anderson, Mayfield and deGraffenried, JJ., dissenting.)

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Mrs. Mary H. Gonzalez against the Birmingham Railway, Light & Power Company, for damages for injuries received while a passenger. Judgment for plaintiff and defendant appeals. Affirmed.

TILLMAN, BRADLEY & MORROW, and L. C. LEADREATER, for appellant. The court erred in overruling demurrers to the first count of complaint.—*B. R. L. & P. Co. v. Parker*, 156 Ala. 251; *Same v. Weathers*, 51 South. 303; *Mobile L. & P. Co. v. Bell*, 153 Ala. 90. The court erred in sustaining demurrer to defendant's plea 5.—*Pace v. L. & N.*, 52 South. 52; *Turner v. L. & N.*, 50 South. 124. On the same authorities the court erred in sustaining demurrer to plea 7. Charge 7 requested by defendant should have been given.—*Phillips v. State*, 156 Ala. 561; *B. R. & E. Co. v. James*, 121 Ala. 120. Charge 2 should have been given.—*Phillips v. State*, 156 Ala. 141; *B. R. L. & P. Co. v. Moore*, 148 Ala. 115. The remarks of counsel were highly improper and prejudicial, and should have been stricken on motion, and failing therein the court should have granted motion for new trial.—*Florence, etc., Co. v. Fields*, 104 Ala. 471; *B. R. L. & P. Co. v. Drennen*, 57 South. *Tannehill v. State*, 159 Ala. 52; 16 N. E. 634; 102 U. S. 451; 13 R. I. 661. The withdrawal of the remarks did not cure the wrong done.—*Woolf v. Minnis*, 74 Ala. 286; 29 Atl. 777. It is not necessary to the granting of a new trial that the in-

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jured party does not raise any objection at the time.—60 N. W. 916; 41 N. H. 317; 10 Ga. 511; 5 Atl. 838; 24 Am. Rep. 575; *L. & N. v. Sullivan T. Co.*, 126 Ala. 95; *E. T. V. & G. v. Bayliss*, 75 Ala. 466; *L. & N. v. Orr*, 91 Ala. 548, and authorities supra.

FRANK S. WHITE & SONS, for appellee. The first count was sufficient and the demurrer thereto was properly overruled.—*Mont. St. Ry. v. Armstrong*, 123 Ala. 244; *B. R. L. & P. Co. v. Haggard*, 155 Ala. 344; *Same v. King*, 149 Ala. 505; *Same v. Adams*, 146 Ala. 268; *Same v. McGinty*, 158 Ala. 413; *Same v. Jung*, 161 Ala. 463; *Same v. Oden*, 51 South. 240; *Same v. Selhorst*, 51 South. 568; *C. of Ga. v. Carleton*, 163 Ala. 66. The court properly sustained demurrers to pleas 5 and 7.—*Creola L. Co. v. Mills*, 149 Ala. 482; *U. S. C. I. P. & F. Co. v. Granger*, 162 Ala. 640; *Osborn v. Ala. S. & W. Co.*, 135 Ala. 571; *B. R. L. & P. Co. v. Dickerson*, 154 Ala. 523; *Same v. Lee*, 153 Ala. 80; *Same v. Anderson*, 163 Ala. 74; *Same v. Hawkins*, 153 Ala. 88; *Same v. Selhorst*, supra. The court properly refused the seventh charge.—Authorities supra. Charge 2 was properly refused.—*Ala. S. & W. Co. v. Thompson*, 51 South. *B. R. L. & P. Co. v. James*, 121 Ala. 125; *A. G. S. v. McWhorter*, 156 Ala. 282. The exceptions to arguments of counsel were not such as to bring the same before this court for review.—*Childress v. State*, 86 Ala. 86; *Nelson v. Shelby Co.*, 96 Ala. 541; *B. R. & F. Co. v. James*, 121 Ala. 124; *B. R. L. & P. Co. v. Windham*, 24 South. 548. See generally on this subject *Alston v. State*, 109 Ala. 54; *L. & N. v. Holland*, 55 South. 1007; *Smith v. State*, 130 Ala. 98; *Moore v. State*, 40 South. 345; *Reynolds v. State*, 68 Ala. 502; *Dickens v. State*, 142 Ala. 51. The objections should have been made at the time the remarks were made, and a ruling should have been re-

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quested thereon.—*B. R. L. & P. Co. v. Morris*, 153 Ala. 209.

SOMERVILLE, J.—The first count of the complaint alleges that plaintiff was a passenger on one of defendant's cars, her destination being Sixth avenue and Twenty-Third Street North, in Birmingham; and that "while plaintiff was in the act of alighting or disembarking from said car it started forward with a sudden, violent jerk, throwing her with great force and violence down to and upon the floor of the car, injuring her," etc. The concluding averment is "that her said injuries were proximately caused by the negligence of the defendant in the negligent manner in which it ran or operated its said car."

Defendant demurred to this count, on the grounds, substantially, that it does not show that plaintiff was alighting at a proper time or proper place, and hence does not show that the sudden start and jerk was a violation of any duty owed to plaintiff by defendant.

On the authority of *B. R., L. & P. Co. v. Haggard*, 155 Ala. 343, 46 South. 519, *L. & N. R. Co. v. Church*, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29, *B. R., L. & P. Co. v. Oden*, 164 Ala. 1, 57 South. 240, *B. R., L. & P. Co. v. Jordan*, 170 Ala. 535, 54 South. 280, *B. R., L. & P. Co. v. Fisher*, 173 Ala. 623, 55 South. 995, this count must be held sufficient as against the demurrer; and its overruling by the trial court was therefore free from error.

We have, in this connection, considered the rulings found in *B. R., L. & P. Co. v. Parker*, 156 Ala. 251, 47 South. 138, and *B. R., L. & P. Co. v. Weathers*, 164 Ala. 23, 51 South. 303. In those cases, as in the present case, the complaint stated the mode of the injury by a recital of facts which, standing alone, were not sufficient to

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show negligence on the part of the carrier; and, as in the present case, it also concluded with a general charge that plaintiff's resulting injury was proximately due to defendant's negligence in carrying plaintiff as its passenger. But in those cases the complaint went further and qualified its general averment of negligence by the addition of the phrase "as aforesaid," which was held to mean "that the facts already alleged in its forepart constitute negligence, and by reason and as a consequence of them, and nothing besides, plaintiff suffered his injuries." Hence the demurrers for insufficiency of averment were there sustained. Those rulings thus predicated are not applicable to the present complaint.

Demurrers were sustained to defendant's pleas 5 and 7, which charge plaintiff with contributory negligence proximately causative of her injuries. Plea 5 alleges that "while plaintiff was going from her seat to the door of said car said car was in motion, and that it was plaintiff's duty to exercise reasonable care to support herself, but that plaintiff negligently failed to exercise such reasonable care to support herself," etc. Plea 7 alleges that "plaintiff while standing in the aisle, or upon the platform of said car, while said car was in motion, negligently failed to properly support and maintain herself in such a standing position, whereby," etc. The demurrers attack these pleas on the ground of the insufficiency of their averment of the facts relied upon as constituting and showing contributory negligence.

It is the settled rule in this state that in such pleas facts must be alleged—facts which are sufficient, in themselves, to show plaintiff's negligence as a conclusion of law, or to reasonably suggest it as an inference of fact. In the latter case, the facts being proved, negligence vel non is a question of inferential fact for the

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jury; and, the facts being consistent with a negative inference, it is essential that the plea should color the equivocal facts by supplying the conclusion that plaintiff's conduct was negligent.—*Pace v. L. & N. R. R. Co.*, 166 Ala. 519, 52 South. 52, 54. Where plaintiff's conduct is not per se negligent, but may be so by reason of attending circumstances, these circumstances must be shown by appropriate averment, as far as is reasonably practicable, though, brevity being the soul of good pleading, shorthand statements may often suffice, when their ultimate constituents would be tedious or difficult of rehearsal.

The pleas in question tacitly admit that plaintiff was injured, while in the act of alighting from the car, as the result of being thrown from her feet onto the floor by reason of the car starting forward with a sudden, violent jerk. Their language is reasonably susceptible of two applications: (1) To the failure of plaintiff to make proper and adequate use of her legs and feet for the support of her body; or (2) to her failure to make use of such external supports as common knowledge teaches us the structure of the car might offer to either hands or feet—in both cases without due regard to the natural impairment of her equipoise while walking or standing on a moving car.

So far as the first alternative is concerned, we think the pleas sufficiently show the duty of plaintiff and its negligent omission by her, as contributory to her injury. But, with respect to the second alternative, we think it is deficient in omitting any averment of facts which might reasonably impose upon a debarking passenger the duty of taking the extraordinary precautions hypothesized—such facts, for example, as the age or physical infirmity of the passenger, the incumbrances carried by her, the speed of the car, and the consequent in-

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security of the balance or footing of the passenger while standing on her feet preparatory to leaving the car, having in view its ordinary and proper movements. We therefore hold that the demurrers on this ground were well taken and properly sustained to pleas 5 and 7.

We note, in passing, that, while a plea substantially like these was interposed in *B. R., L. & P. Co. v. Selhorst*, 165 Ala. 475, 51 South. 569, its sufficiency in these aspects was not determined.

The trial court refused to give this charge, as requested in writing by the defendant: "If you believe from the evidence that plaintiff walked down the aisle when the car was in motion, then I charge you that plaintiff assumed the risk of all proper and ordinary movements of the car." This charge, it seems, states a correct proposition of law.—*B. R., L. & P. Co. v. James*, 121 Ala. 120, 123, 25 South. 847; *L. & N. R. R. Co. v. Smith*, 129 Ala. 561, 30 South. 571. It must, however be pronounced abstract and properly refused in the present case, in view of the absence of any evidence tending to show that plaintiff was injured *while walking down the aisle* of the car while it was in motion, or by reason of this walking; for all the testimony shows that she was standing at the back of the car at the time she lost her balance and fell.

The trial court refused also the following charge, requested in writing by the defendant: "If, after a full and careful consideration of all the evidence, any individual juror is not reasonably satisfied from the evidence that plaintiff was negligently or wantonly or willfully injured, then you cannot find for the plaintiff." If the question were before us for the first time, the writer would be much inclined to approve the dissenting views of Denson, J. (concurring in by Weakley, C. J.), in the case of *B. R. L. & P. Co. v. Moore*, 148 Ala.

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115, 131, 42 South. 1024, where a substantially similar charge was held to have been improperly refused; but this identical charge has been recently approved, and we adhere to that ruling.—*B. R., L. & P. Co. Co. v. Humphries*, 171 Ala. 291, 54 South. 613, where the cases are cited and discussed. It is to be observed, however, (1) that this charge in terms submits to the jury, not only the issue of defendant's simple negligence, but also the issues of *willful and wanton* injury; (2) that there was never any complaint of willful injury; and (3) that the counts for wanton negligence were eliminated from consideration by the following language in the oral charge of the court: "At the request of the defendant, in writing, I charge out these [wanton] counts, they are not before you for consideration; only the counts that charge simple negligence on the part of defendant are up for consideration." Then proceeds the record, "At the conclusion of the oral charge of the court, the defendant requested the court, separately and severally, in writing, to give the jury each of the following charges," among others, the charge in question. It is thus apparent that the trial court could not have given this charge as to the issues of willful and wanton injury without self-contradiction, and, indeed, self-stultification, superinduced by defendant. And it seems clear that the trial court cannot be put in error for refusing the charge as framed.

The trial court overruled defendant's objections to the following statements made by plaintiff's counsel in his closing argument to the jury: (1) "Millions of nickels and dimes go into the coffers of the company and to the stockholders." (2) "We give them valuable franchises." (3) "Why didn't they put on their corps of men that hang around the court?" It is earnestly argued that permitting these statements to go to the jury

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was reversible error; and that by reason of their prejudicial character they presumptively influenced the verdict adversely to defendant in such degree as to entitle defendant to a new trial, for which it duly but unsuccessfully moved.

In *Cross v. State*, 68 Ala. 476, 484, Judge Stone, speaking the conclusions of this court as to reversal on error for improper statements by counsel in argument, said: "There must be objection in the court below, the objection overruled, and an exception reserved. The statement must be made as *of fact*; the fact stated must be unsupported by any evidence, (and) must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury."

The first two statements are not arguments, but statements of fact, pure and simple. They find no support whatever in the evidence; nor are they in the slightest degree relevant to any issue that was before the jury. Have these statements a natural tendency to influence the finding of the jury?

We have given due consideration to this question, and cannot escape the conviction that they distinctly have such a tendency. They presented to the jury a consideration of the wealth, revenues, and advantages enjoyed by the defendant corporation, and must have carried the sinister suggestion that those matters were to be considered by the jury in determining, either the fact of defendant's responsibility, or the amount of the penalty it ought to pay. For it is to be borne in mind that the trial judge, by his refusal to exclude these statements when objected to, in effect informed the jury that they were proper matters for their consideration. It may be conceded that they are matters which most intelligent men would know about anyway; but it is to be presumed that jurors would not violate their oaths by resort-

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ing to private knowledge of immaterial facts, while it can hardly be doubted but that they would consider and use them, when presented to them by counsel and stamped with the approval of the court. And, indeed, it is but just to say that, unless the facts stated were intended to influence the jury, and were deemed capable of doing so, they would hardly have been presented by plaintiff's counsel.

It is true that the trial judge, in his oral charge, afterwards said to jury: "It is immaterial whether the stockholders get the nickels or not, or whether the bondholders, or it is not material where they go to; the material inquiry in this case is whether or not the plaintiff is entitled to recover." But this clearly falls very far short of removing from the jury's consideration, especially on the question of the amount of damages, the obnoxious fact that the defendant corporation was getting millions of nickels and dimes; and it does not withdraw the fact that it was enjoying valuable franchises.

We do not overlook the principles declared in *Cross v. State*, *supra*, and other later cases, emphasizing the impolicy of interfering with counsel in framing his arguments, in drawing and stating his inferences, and in using his illustrations, except in cases of flagrant and clearly prejudicial abuse. But when counsel leaves the field or argument, inferences, and illustration, and states to the jury, *as independent facts*, matters that are not in evidence at all, a different rule is applicable; and courts cannot hesitate to interfere whenever necessary to prevent such an abuse of the proper functions of counsel in argument. This subject has been considered and the authorities reviewed by us in the recent case of *B. R., L. & P. Co. v. Drennen*, 175 Ala. 338, 57 South. 876, to which we here refer. See, also, *L. & N. R. R. Co. v. Holland*, 173 Ala. 675, 55 South. 1001, 1007.

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We think the trial court erred in refusing to exclude the statements in question, and for this error the judgment must be reversed and the cause remanded for another trial.

Reversed and remanded. All the Justices concur.

ON REHEARING.

On the original hearing the judgment was reversed on a single point, viz., the overruling of defendant's objections to certain statements made by plaintiff's counsel in his closing argument to the jury. That question was argued by both sides on its merits, and was so treated by this court. Our attention is now called to the recitals of the record with respect to the objections in question, and it is insisted that no reversible error is shown.

The recitals referred to are as follows: "During the closing argument of counsel for plaintiff to the jury, the defendant objected, separately and severally, to the following statements of counsel in his argument to the jury: 'Millions of nickels and dimes go into the coffers of the company and to the stockholders.' 'Why didn't they put on their corps of men that hang around court?' 'Not knowing where she would get her meals, except through charity.' 'Somebody took the names of the witnesses.' 'We give them valuable franchises.' The court overruled the objections separately and severally, to which action of the court in overruling the same the defendant duly excepted."

The fifth of the quoted statements is supported by the testimony of defendant's witness Crabtree; and we are unable to say that the second and third statements, as presented, were either improper as arguments, or capable of prejudicing the jury against defendant. While

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the objections were made to these statements separately and severally, and were overruled separately and severally the *exception* was taken to all of these rulings collectively. A single exception to a series of rulings is unavailing, if any one of them is correct.—*Alston v. State*, 109 Ala. 54, 20 South. 81; *Smith v. State*, 130 Ala. 95, 30 South. 432; 8 Ency. Pl. & Prac. 167. We think the exception here shown is not sufficient to entitle appellant to a separate consideration of each ruling; and, some of them being free from error, the exception cannot be sustained.

Although the record shows that the objections were separately made to each statement *during the closing argument*, it does not show that they were called to the court's attention at the time each statement was made. This may well have been done under this recital an hour or more after the objectionable statements were made by counsel, and doubtful recitals must be construed most strongly against the exceptor.—*Dickens v. State*, 142 Ala. 51, 39 South. 14, 110 Am. St. Rep. 17. To put the trial court in error, it should, in general, be made to appear that its ruling was appropriately invoked promptly upon the utterance of the supposedly improper remarks.—*Birmingham Nat. Bank v. Bradley*, 108 Ala. 208, 209, 19 South. 791; *B. R. L. & P. Co. v. Morris*, 163 Ala. 190, 209, 50 South. 198; 1 Brickwood's Sackett, Instructions, § 244; 2 Ency. Pl. & Pr. p. 752; 1 Thompson on Trials, § 957; *Whaley v. Vannatta*, 77 Ark. 238, 91 S. W. 191, 7 Ann. Cas. 230, and note. In this respect the record is deficient.

It appears from the record that defendant merely *objected* to the quoted statements, without invoking any action of the court thereon. Had the objection been sustained, without any exclusion of them by the court, and without any instruction to the jury to disregard them,

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these statements would have remained before the jury, and their possibly evil influence would have remained substantially uncorrected. The effect of our decisions is that a mere objection to already spoken words does not reach the evil aimed at, and that the court must be appealed to to exclude them from the consideration of the jury, failing which there is nothing presented for review by an exception.—*K. C., etc., R. R. Co. v. Webb*, 97 Ala. 157, 163, 11 South. 888; *Cutcliff v. B. R. L. & P. Co.*, 148 Ala. 108, 41 South. 873; *B. R., L. & P. Co. v. Drennen*, 175 Ala. 338, 57 South. 876, 886. This rule, it may be, does not logically apply to an objection to the *continuation* of an improper line of argument, as to which the error and the injury might, perhaps, be imputed to its overruling alone. But this we do not decide. See *Sullivan v. State*, 66 Ala. 50.

Where the objectionable statements are objectionable only because they are of matters of fact that are not in evidence, it is both just and reasonable to require the objection to so state to the court, and thus aid it to that extent in the decision of the question raised. There was no such suggestion here made to the court.

For the reasons above set forth, we feel impelled to hold that the bill of exceptions fails to show error on the part of the trial court in the particular complained of, or, indeed, that its action was invoked in the premises.

There was, however, a motion for new trial, and the making of each of the five quoted statements by plaintiff's counsel is separately assigned as a ground therefor. When the question is thus presented, without appropriate objection and appeal to the trial court for corrective action at the time the remarks were made, the test for favorable action, and specially for revisory action, is, not whether the remarks have merely a natural

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tendency to unfairly prejudice the other party's case, but whether they are "grossly improper and highly prejudicial."—*L. & N. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 27 South. 760. "The rule [requiring an appeal to the court for corrective action] is subject to the exception stated in the reported case that, if the improper remarks are of such a character that neither rebuke nor retraction can entirely destroy their sinister influence, a new trial should be promptly awarded, regardless of the want of a proper objection or exception."—*Whaley v. Vannatta*, 7 Ann. Cas. 231, editorial note. Of this character are the cases of *Florence, etc., Co. v. Field*, 104 Ala. 471, 480, 16 South. 538, 540, and *B. R., L. & P. Co. v. Drennen*, *supra*.

Upon a very full consideration of the two statements heretofore pointed out as improper, we cannot say, from the dim light afforded by the record, that they were, as made, either *grossly* improper or *highly* prejudicial. Each case of this character must be decided upon its own merits. There is no horizontal rule by which these qualities can be ascertained in all cases. Much will depend upon the issues, the parties, and the general atmosphere of the particular case. The final test is: Can the prejudicial tendency or effect of the improper statement be counteracted by an appropriate instruction from the trial judge, or is it probably beyond the reach of such remedial action?

We do not think the prejudice that might have resulted from the quoted statements was by any means incurable; and we are therefore not willing to reverse the action of the trial court in refusing to set aside the verdict for this cause, especially as the evidence was amply sufficient to justify a verdict for the plaintiff, and the amount awarded cannot be regarded as excessive, in view of the evidence of her injuries.

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The opinion of Stone, J., in *Wolff v. Minnis*, 74 Ala 386, 389, cited in the dissenting opinion of Justice MAYFIELD, is authority for the proposition that the prompt and emphatic disapproval of the improper statements of counsel by the court itself may suffice to "avert the probable mischief." And, where it would in all probability do so, it is but just and proper, and, indeed, in accord with the general principles of trial practice, that it should be promptly invoked by the party complaining.

It is to be noted, also, that the grounds assigned for a new trial are merely that these several remarks were made to the jury. This does not charge that any of these remarks affected the jury in the production of a verdict unfavorable to the defendant, or excessive in amount. These assignments are therefore not sufficient to raise those questions.

We do not wish to be misunderstood as to our attitude toward some of these remarks, and, in general, toward all such improprieties in argument. The remarks of plaintiff's counsel in regard to the defendant's revenues and franchises ought not to have been made to the jury; and, had the action of the court been promptly and properly invoked, its refusal to instruct the jury to disregard them would have worked a reversal of the judgment.

It results that the judgment of reversal must be set aside, and a judgment of affirmance entered.

Rehearing granted, and judgment affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ., concur. ANDERSON, MAYFIELD, and DE GRAFFENRIED, JJ., dissent.

MAYFIELD, J.—(dissenting).—I cannot subscribe to the doctrine announced in the majority opinion in

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this case on the application for a rehearing. The original opinion was correct, and should have been adhered to.

The opinion of my Brother SOMERVILLE on this application, I fear, takes a step in the wrong direction, and I cannot follow. To me it seems to encourage transgression of the law, and to reward the laws offender at the expense of him who is offended against. Brother SOMERVILLE'S opinion, in my judgment, says to the advocate, in effect, though not in words: "Use any argument not *grossly* improper or *highly* prejudicial, if by it you may obtain a verdict in favor of your client; for, perchance, under the rules announced by the court, the other party may not be able to object and except at the right time, or in the right manner, and your verdict, however procured, will be good and valid." Of course, I know that Brother SOMERVILLE and those who agree with him do not think this is the effect of the decision. They are as free from any will or desire to produce such a result as I am. Their error is in failing to perceive the effect of what they have said and decided.

The opinion, as I read it, concedes that the argument in question was improper, and calculated to prejudice the party against whom it was used. The record conclusively shows that it was effective; that is that the verdict was what the argument tended to produce. So there is no ground upon which "error without injury" can stand; yet the court in effect says to the plaintiff: "You did wrong, and profited by it; but you did it so artfully and gently that the one whom you wronged was not able to so make or formulate his objections and exceptions as to prevent you from profiting by it; so we say to you: 'Go on; do it again; but don't get caught.'" This, I think, is shown by the part of the opinion of Brother SOMERVILLE after stating the remarks of coun-

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sel, to which he refers. He says: "They presented to the jury a consideration of the wealth, revenue, and advantages enjoyed by the defendant corporation, and must have carried the sinister suggestion that those matters were to be considered by the jury in determining, either the fact of defendants responsibility, or the amount of the penalty it ought to pay. * * * And, indeed, it is but just to say that, unless the facts stated were intended to influence the jury, and were deemed capable of doing so, they would hardly have been presented by plaintiffs counsel."

To these remarks of counsel, the counsel for the defendant corporation objected, and when the trial court overruled the objection the objecting party excepted. The trial, of course, resulted in a verdict and judgment for the plaintiff, just as the court says was intended by counsel in using the improper arguments. By the aid of the trial court he scored against the defendant by this argument, when he might not have been able to do so without it. Counsel for defendant, still objecting, and still insisting upon the trial court's correcting the error, moved the court for a new trial, on the ground that the verdict was obtained by this concededly improper argument. The trial court adheres to his former erroneous ruling, and overrules the motion and allows the ill-gotten verdict to stand. And this court says to the offending party: "Profit by your own wrong, because the party offended against was not able to prevent the trial court from aiding and allowing you to so profit; and he did not so formulate and time his objections and protests as that we can correct the error; so go on and do it again, and the chances are, if the trial court does not stop you, we cannot, unless "grossly improper and highly prejudicial.'"

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The effect of this decision, in my humble judgment, is to say that this court should affirm errors, if it can, and should correct them only when it is impossible to affirm. I do not believe this to be the proper function or office of an appellate court. I rather agree with the Missouri court that "an appellate court is a court for the correction of errors—its own as well as others."—*Mangold v. Bacon*, 237 Mo. 516, 141 S. W. 655. The Docket, December, 1912, p. 849.

Technical rules to prevent wrong and injustice are authorized, and are to be commended; but to allow them to work a wrong or injustice is a bad practice, which will destroy the usefulness of appellate courts.

I am aware, of course, that the majority do not think they are affirming this case on technical grounds, nor that they are aiding injustice or wrong in the decision; but to my mind this is the effect of the ruling, and for these reasons I cannot agree to the decision. The grave error, according to my view, into which the majority have fallen is foreshadowed in the part of Brother SOMERVILLE'S opinion which, after stating, in effect, that the remarks were improper and tended, and "were intended," to influence the jury, "and were deemed capable of doing so," concludes as follows: "Upon a very full consideration of the two statements heretofore pointed out as improper, we cannot say, from the dim light afforded by the record, that they were, as made, either *grossly* improper or *highly* prejudicial." In other words, the court decline to correct the error, because they cannot say it was "*grossly* improper" or "*highly* prejudicial."

I do not think the law in this state has ever before been announced to be that, in order for the error of a trial court to be corrected on appeal, it must be affirmatively shown by the party injured that the error was

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“*grossly improper*” or “*highly prejudicial*.” There may be dicta to support such a conclusion; but I am sure that there are not, and ought not to be, any decisions to such effect. The rule of law in this state is now, and has ever been, that all the appellant is required to show is error on the part of the trial court. When he shows this, the law presumes injury, without inquiry whether the error was “*grossly improper*” or “*highly prejudicial*.” If, however, the record affirmatively shows that there was no injury, then, of course, the appellate court will not reverse; but, unless this is affirmatively shown, the court must reverse, or the court fails to do its duty—to perform the only function for which it was created, and which affords the only excuse for its existence.

This rule of appellate procedure has been well stated by McClellan, J., in *Maxwell's Case*, 89 Ala. 164, 7 South. 828, the decision in which case has been frequently quoted and readopted by this court; and the statutes and the published rules of this court have been readopted with this known construction placed upon them. In that case the error complained of was in the admission of evidence. Justice McClellan said: “It may be—indeed, it is highly probable—that the evidence did not prejudice the defendant. Nay, further, we are utterly unable to see that it did or could have worked him injury. But, on the other hand, we *cannot affirmatively see that it did not injure him*; and we do not feel that safety and certainty, which the rule, even in civil cases, requires to rebut the presumption of injury from error, that no harm was done which would warrant us in holding this error to have been without prejudice.” (The italics above are his, not ours.)

I know that the language of Brother SOMERVILLE, quoted above, was intended to refer to the remarks of counsel for plaintiff, and not to the action of the trial

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court; but the error of the court in declining to stop such remarks, and in thus approving them, can stand in no better, if in as good, light as do the remarks of counsel. Appellate courts do not and cannot review the actions of litigants or their attorneys in nisi prius courts; they can only review actions of the trial court.

The trial court was repeatedly called upon to check or prevent this improper argument, and declined repeatedly so to do, thus, in effect, saying to the jury and the litigants, "This is proper argument." The defendant's counsel not only repeatedly objected to the argument, and excepted to the ruling and action of the court during the argument, but after this, and after the verdict was procured and was such a one as this argument was calculated to produce, the defendant again moved the court to right its former wrong and error by setting aside the verdict so obtained and awarding a new trial, and the court declined to correct its error, or to attempt to relieve against it; and on appeal this court declines to reverse, notwithstanding it is conceded that numerous errors are shown, for the reason, as the court says: "Upon a very full consideration of the two statements heretofore pointed out as improper, we cannot say, from the dim light afforded by the record, that they were, as made, either *grossly* improper or *highly* prejudicial." In my opinion, this is a new departure from a long line of cases in this court which are cited and reviewed in the case of *B. R., L. & P. Co. v. Drennen*, *supra*.

In *Drennen's Case* the trial court sustained the defendant's objection to the remarks of plaintiff's counsel, and nothing further was then requested by counsel; and hence there was nothing to review as to the action of the court on the main trial, because the only ruling or action of the court in the matter was in favor of the defendant; but the defendant assigned this remark of

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counsel as a ground for a new trial, and the trial court overruled the motion, and we held it was error, and reversed the case.

Here the counsel for the same defendant objected several times, and the court overruled his objection, and the defendant excepted. Here there is an action of the court to review as to the main trial, and one which, this court says, in effect, was an erroneous action; but it declines to reverse. The defendant then, in this case, moved the court to grant a new trial on the ground of this improper and prejudicial argument of counsel, which the court had repeatedly declined to check, and in effect approved, for the consideration of the jury. The trial court again erred and refused to do its duty; and this court declines to correct the error, because, as is said, from the dim light afforded by the record, the court cannot say that the remarks were "*grossly* improper and *highly* prejudicial."

In the case of *Wolffe v. Minnis*, 74 Ala. 386, the remarks of counsel were nothing like as objectionable as in the present case, and when objected to counsel making the remarks said: "Oh, well, I'll take it back." The defendant's counsel said to the court, "The defendant insists on his objection." The court said nothing; did not withdraw said remarks from the jury, nor instruct them not to consider the same, and did not take any action in reference thereto; and the defendant excepted thereto. The defendant did not expressly ask the court to instruct the jury not to consider the same, and did not expressly ask the court to take any action in reference thereto; yet, notwithstanding the defendant's counsel did not ask the court to take any action, the court considered it reversible error, and that it was properly raised by a mere objection and exception. The court, speaking through Stone, J., in that case said: "We

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think the language complained of in this case should not have been indulged; and coming as it did from able, eminent counsel, it was well calculated to exert an improper influence on the minds of the jurors. The court might, and probably should, have arrested it *ex mero motu*. It is one of the highest judicial functions to see the law impartially administered, and to prevent, as far as possible, all improper, extraneous influences from finding their way into the jury box. And when opposing counsel objected to the improper language employed, and called the attention of the court to it, it was not enough that offending counsel replied: 'Oh, well, I'll take it back.' Such remark cannot efface the impression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument; and that they should not consider anything thus said in their deliberations. Nothing short of a prompt, emphatic disapproval of such line of argument, and that from the court itself, can avert the probable mischief.—*Sullivan v. State*, 66 Ala. 48; *Cross v. State*, 68 Ala. 476."

The other cases are reviewed in *Drennen's Case*, *supra*.

The Texas and Georgia courts have, in my judgment, stated the true and correct rules of practice in such cases. They have said:

"The rules for the government of the district court prescribe that 'counsel shall be required to confine the argument strictly to the evidence and to the argument of opposing counsel;' and that 'the court will not be required to wait for objections to be made when the rules as to arguments are violated, but, should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection.'—Rules 39 and 41 (142 S. W. xx)

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"It is further provided (rule 121) that any supposed violation of the rules to the prejudice of a party may be reserved by bill of exceptions, presented as a ground for a new trial, and assigned as error by the party who may have conceived himself aggrieved by such supposed violation."—*Willis v. McNeill*, 57 Tex. 474, 475.

"In announcing as a rule of practice that which was subsequently incorporated into the present rules of court, above quoted, it is said by the late learned Chief Justice of this court, in *Thompson v. State*, that 'zeal in behalf of their clients, or desire for success, should never induce counsel in civil cases, much less those representing the state in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon other than the facts in the case and the conclusions legitimately deducible from the law applicable to them.' It is further said that such practice is of sufficiently grave importance and so highly objectionable as to require the decided condemnation of the court.— 43 Tex. 274.

"Whether counsel, under such circumstances, remain silent or object may be alike prejudicial to his cause. Silence may be construed into acquiescence; objection may call forth a damaging repartee."—*Willis v. McNeill*, *supra*.

"Nor ought the presiding judge to wait until he is called on to interpose. For it is usually better to trust to the discrimination of the jury as to what is and what is not in evidence than for the opposite counsel to move in the matter. For what practitioner has not regretted his untoward interference, when the counsel, thus interrupted, resumes: 'Yes, gentlemen, I have touched a tender spot; the galled jade will wince; you see where the shoe pinches.'"—*Berry v. State*, 10 Ga. 522.

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Such, I submit, is practically the rule that has always prevailed in this court. See *Florence v. Field*, 104 Ala. 471, 16 South. 538, where it is said: "On objection raised by defendant's counsel, the court said the objection was sustained, and stated to counsel making the remark that it was improper; whereupon the said counsel remarked: 'Well, I withdraw the remark.' There was no exception reserved by defendant to this remark of counsel, nor to the action of the court upon it. Nor is it made the basis of a motion for a new trial. It is, however, assigned as error. We have referred to it to state that the remark was calculated to seriously prejudice and injure the defendant with the jury. The action of the court in excluding it was very mild, and not a sufficient antidote to the poison that had been injected into the minds of the jury by the use of such language. Verdicts ought not to be won by such methods; and when an attorney, in the heat of debate, goes to such extraordinary lengths, generally the court should promptly set aside any verdict that may be rendered for his client. The repressive powers of a court to prevent such departures from legitimate argument of a cause before a jury should be vigorously applied. No mere statement that it is out of order or improper can meet the exigencies of the cases. Nothing short of such action on the part of the court and a clear satisfaction, that the prejudice naturally excited by the use of such language had been removed from the minds of the jury ought ever to rescue a case from a new trial on motion of the party against whom rendered."

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Cahaba Coal Co. v. Elliott.*Injury to Servant.*

(Decided May 15, 1913. Rehearing denied June 19, 1913.
62 South. 808.)

Master and Servant; Injury to Servant; Complaint.—In a personal injury action by a servant, a complaint which merely alleges the injury and that it was caused by the negligence of the superintendent of the master, is not sufficient, although following the language of the statute, (subdivision 2, section 3910, Code 1907); the field of superintendence is a wide one, covering all of the master's business, and the mere allegation that the negligence of the superintendent caused the injury was not sufficient to give the master notice of the negligence charged.

(McClellan, J., dissents.)

APPEAL from Shelby Circuit Court.

Heard before Hon. HUGH D. MERRILL.

Action by J. T. Elliott against the Cahaba Coal Company, for injuries, while in its employment. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 11 is as follows: "Plaintiff claims of defendant the sum of \$25,000 as damages for that whereas, on or about the 1st day of April, 1912, defendant was operating a coal mine in Shelby county, Ala., in connection with which it operated coal mining machinery, consisting of, among other things, a hopper, in which rock was dumped, and a tramway extending from under said hopper out and away from the same at a considerable incline. At the end, or near the opposite end, of said tramway from said hopper there was an engine used as a motive power to draw a tram or rock car on said tramway by means of a cable. Said engine was used to furnish the motive power to draw said tram or rock car up said incline of said tram railway, and to lower the

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same back beneath and under said hopper for the purpose of being loaded with rock from said hopper, and plaintiff avers that said hopper was inclosed with a plank inclosure, and the said hopper was supported by framework foundation, and in the operating of said defendant's business rock from defendant's mine was loaded into or emptied into said hopper and emptied out of said hopper into said tram or rock car, and carried from there up or near where said engine was located, as aforesaid, and dumped out of said car, and plaintiff avers that on said date the said engine which furnished the power to hoist and lower said tram or rock car was in charge of defendant's engineer, and was being operated by him, and on said date plaintiff was employed by defendant in the capacity of blacksmith, and plaintiff avers that while he was thus employed or engaged in the service of defendant, and acting within the line and scope of his duty as the defendant's employee, and engaged in the service of defendant, in and about repairing said hopper or foundation of said hopper, said tram or rock car was caused to run or back against the plaintiff, and fastened plaintiff in between said car and said hopper, or the framework or foundation thereof, and as a proximate consequence thereof plaintiff was greatly, permanently, and severely injured as follows: (Here follows catalogue of injuries.) And plaintiff avers that he suffered said injuries and consequent damages by reason of and as a proximate consequence of the negligence of Charles Hines, who was at the time in the service or employment of defendant, and who had superintendence intrusted to him, and whilst in the exercise of such superintendence."

The demurrers were, in effect, that the count failed to point out the particular act of superintendence upon which plaintiff relied for recovery, and that the count

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fails to show wherein or how said superintendent was negligent whilst in the exercise of such superintendence.

CHARLES A. CALHOUN, for appellant. The cause went to the jury on count 11 as amended and the court erred prejudicially in overruling demurrers to such count.—*Reiter-C. M. Co. v. Hamlin*, 144 Ala. 192; *Decatur C. W. & M. Co. v. Mehaffey*, 128 Ala. 274; *L. & N. v. Jones*, 130 Ala. 456. The case decisive of the case at bar upon the particular point here involved is that of *Maddox v. Chilton W. Co.*, 171 Ala. 224. Defendant was entitled to the affirmative charge under the evidence.—*Williams v. Woodward I. Co.*, 106 Ala. 258; *A. G. S. v. Vail*, 142 Ala. 141; *Pryor v. L. & N.*, 90 Ala. 35; *Thomas v. Sloss-Sheffield*, 144 Ala. 188.

RIDDLE, ELLIS, RIDDLE & PRUET, and RIDDLE & BURT, for appellee. Count 11 as last amended was in all things sufficient, and the court properly overruled demurrers thereto.—*Seaboard M. Co. v. Woodson*, 94 Ala. 143; *Bear Creek M. Co. v. Parker*, 134 Ala. 293; *Ill. C. & E. Co. v. Walsh*, 134 Ala. 490; *Postal T. Co. v. Jones*, 137 Ala. 217; *Creola L. Co. v. Mills*, 149 Ala. 447. The judgment entry does not show any action of the court on the demurrers as to any separate count of the complaint, and hence this court cannot say as to which particular count the demurrers were overruled, and cannot review the action of the lower court.—*C. of Ga. v. Ashley*, 159 Ala. 145; *Ala. C. Co. v. Niles*, 47 South. 239; *Greil v. Lomax*, 86 Ala. 132.

McCLELLAN, J.—Action by servant (appellee) against the master (appellant) for damages for personal injuries received while engaged in the masters service. Of the 16 counts filed, only count 11 was sub-

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mitted to the jury. That count was designed to state a cause of action under subdivision 2 of the Liability Act (Code, § 3910). The report of the appeal will contain count 11.

Upon the authority of *Woodward Iron Company v. Marbut*, *infra*, 62 South. 804, in treating count 4 in that case, the majority of the court hold that count 11 was subject to the demurrer, which the trial court overruled. The reversal of the cause necessarily follows.

On what appears to me to be the apt authority afforded by *Alabama Great Southern Railroad Company v. Davis*, 119 Ala. 572, 24 South. 862, affirming the sufficiency of count 1, decided 15 years ago—*Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700, affirming the sufficiency of count 3, decided in 1902, and particularly *Creola Lumber Co. v. Mills*, 149 Ala. 474, 42 South. 1019, affirming the sufficiency of count 1, decided in 1906—the writer dissents from the conclusion prevailing in this and the *Marbut Case* (*supra*) in respect of the sufficiency of counts 11 and 4 in these cases. The only decision opposed to the three cases above cited is the *Maddox Case*, 171 Ala. 216, 224, 55 South. 93, decided in 1911; and there no account appears to have been taken of the decisions contrary to which it concludes. These decisions, viz., *Davis*, *Parker*, and *Mills* (*supra*), cannot, in my opinion, be rationally distinguished to the end that the inapplication of their clear doctrine can be conceived or effected. I am unwilling, without ample warning to the trial courts and to the profession, to overrule them after they have stood unquestioned, and doubtless have been frequently followed and relied upon by the trial courts and the profession for so many years.

The process of attempting the differentiation of previous decisions by recourse to the *facts* only, and not by

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reference also to the principle which such decisions illustrate, will lead inevitably to confusion, uncertainty, and conflict. The facts of a case may avert the application of a principle; but facts that invoke the application of a principle may be as variant as human action, and yet the principle applicable must, if reason reigns and logic leads, cast the legal conclusion. If the *Davis*, *Parker*, and *Mills Cases* are wrong, they should be overruled, and not left to establish or create a line of authority opposed to the presently prevailing view.

According to the view of the majority, the judgment is reversed, and the cause is remanded.

ANDERSON, MAYFIELD, SAYRE, SOMERVILLE, and DE GRAFFENRIED, J.J., concur. MCCLELLAN, J., dissents. DOWDELL, C. J., not sitting.

ON REHEARING.

MCCLELLAN, J.—After full consideration by the court of the arguments and authorities presented in the brief of appellee's counsel in support of the application for rehearing, the majority of the court adhere to their original view that count 11 was subject to the demurrer as indicated by the opinion in *Marbut's Case*, (ante), and hence overruled the application for rehearing. The writer's opinion in dissent, is further confirmed as the result of the consideration afforded by the application for rehearing. I can but regret that the so rationally founded and thoroughly supported (by the deliverances made in the *Davis*, *Parker* and *Mills Cases*) rule which count 11 here, and count 4 in the *Marbut Case*, perfectly illustrate should, at this late day, be departed from. That long-recognized rule conforms to simplicity in pleading, and so without the slightest possible prejudice to a defendant in the opportunity to prepare for

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and present his defense. The rule declared and applied in this and in the *Marbut Case* must, if enforced, exact, it seems to me, an wholly unnecessary multiplication of and particularity in counts where the second subdivision of the Liability Act (Code, § 3910) is attempted to be availed of in an action by a servant, and in consequence subject the administration of the law in such cases to a system of detail in pleading, under that subdivision, that cannot be of any practical benefit to any one.

It is insisted for appellee that the three distinct considerations to be quoted prevent the review here of the trial court's action in overruling the demurrer to count 11. They are these: "(a) The judgment entry does not show any ruling of the lower court on demurrers to count No. 11 of the complaint, and only shows a ruling on the demurrers to the complaint; (b) after the evidence was all in, the judgment entry affirmatively shows that the plaintiff amended the complaint, and that on the complaint as amended issue was joined, and that no demurrers were refiled to the complaint after it was amended; (c) there is only one assignment of error based on the court's ruling on demurrer. It is assignment of error No. 1, in the following language: '1. The lower court erred in overruling appellant's demurrers, and each separate ground thereof to the eleventh count of plaintiff's complaint as last amended.'—Tr. pp. 19, 4 to 8, 12 to 15." The unanimous opinion of the court is that none of these propositions asserted for appellee are well taken or have merit.

So far as it has bearing on these propositions, the judgment is as follows: "The court granted the plaintiff leave to file, and the plaintiff did file, an amendment to the complaint, adding counts No. 6 to No. 16, both inclusive, as shown by separate paper writing on file, and

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striking from the complaint counts No. 1 to No. 5, both inclusive, and the plaintiff further amends the complaint by amending count No. 12, and by adding count No. 13½, as shown by separate paper writing on file. Whereupon the defendant demurred to the complaint *as shown by separate paper writing on file*, which demurrers being argued by counsel for the plaintiff and the defendant, and the same being heard, considered, and understood by the court, it is therefore ordered, considered, and adjudged by the court that *said demurrers* be and they are hereby overruled. * * * And after the evidence was all in the plaintiff further amended the complaint by withdrawing and striking from the complaint and the files each and every count of the complaint, except count No. 11 and count No. 13½, which was left in said complaint as a part of those said counts. Whereupon, issue was joined upon count No. 11 and count No. 13½ as constituting the complaint as amended."

Consulting the reference in the judgment entry to the demurrers "as shown by separate paper writing on file," the record proper disclosed a pleading of that kind, thus captioned: "Comes the defendant in above-entitled cause, and by leave of the court first had and obtained demurs to the complaint as amended, and each count thereof separately, and severally assigns thereto all the grounds of demurrer heretofore assigned to the original complaint and the following additional grounds of demurrer, to wit: To the sixth count of the complaint. * * * To the eleventh count. * * * The amendment referred to in the judgment entry, and also in the caption of the demurrer, was the addition of counts 6 to 16, inclusive, thus comprehending count 11. As plainly appears from the record, the subsequent amendment of the complaint, by the addition or elimi-

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nation of other distinct counts, did not change count 11. So, under the here pertinent doctrine of *B. R. L. & P. Co. v. Fox*, 174 Ala. 657, 669, et seq., 56 South. 1013, the demurrant was not, in order to assure review here, obliged to *refile* his overruled demurrer to count 11, since that count had not, subsequent to such ruling, been changed by amendment. Hence, proposition "b," quoted ante, is without merit. Its demurrer to unchanged count 11 having been considered and overruled, the defendant manifestly expressed no waiver in the premises by joining in issue upon the averments of that count (11).

Bearing in mind the italicised words of reference in the judgment entry, and consulting the subject of that reference, it readily appears that the court intended and did in fact consider and *overrule* the "said demurrers," which were separately and severally addressed, in the caption thereof, to the *eleventh* count of the amended complaint among other counts composing the complaint as amended. There was no demurrer attacking the original complaint or the complaint as amended, *as a whole*. Such was the case in *Central of Ga. Ry. Co. v. Ashley*, 159 Ala. 151, 48 South. 981. In that instance there were demurrers addressed to the separate counts of the complaint, and also a demurrer to the complaint *as a whole*. The judgment entry expressed a ruling on "demurrer to the complaint" only; and, consistent with the presumptions, indulged on appeal, in favor of no error in the result attained in the trial court, the judgment entry there was interpreted as only responding to the demurrer to the complaint *as a whole*. Hence that decision is without bearing here. Upon like considerations, construing a judgment entry, the court, in *Ala. Chem. Co. v. Niles*, 156 Ala. 298, 302, 303, 47 South. 239, took and made

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effective in its ruling the manifest distinction between a demurrer to a complaint *as a whole* and demurrer addressed to separate counts composing the complaint. In the *Niles Case*, the record contained no demurrer to the complaint *as a whole*, but only demurrers to separate counts of the complaint. Hence the review of that which the judgment entry expressed, in that connection, was of course impossible, not being shown in the record. If in the case at bar there had been a demurrer assailing the amended complaint *as a whole*, and a judgment entry phrased as in the *Ashley Case*, this court would of course refer the ruling thus expressed to that only which could invite the trial court's response, viz., a ruling on a demurrer to the complaint *as a whole*. All of the grounds of the demurrer were, under appropriate subheads, pointed to particular counts, denoting them by number, as accords with the familiar practice in this state. So, the allusion in the quoted caption of the demurrer to the "complaint as amended" had and could have, in the light of the grounds assigned and as particularly assigned, reference to the state of the complaint *as being amended*—as being demurrer interposed, in proper order *after* amendment. In a sense a demurrer to one only of 16 counts is a demurrer to the complaint; but the familiar and necessary distinction adverted to before, and illustrated in the *Ashley* and *Niles Cases* (ante), between a demurrer to a complaint *as a whole* (for instance, for misjoinder of counts, or parties, etc.) and to distinct parts thereof, called, in our practice, *counts*, gives the phrase, *demurrer to the complaint* a signification of a more particular nature.

The conclusion is clear and inevitable from this record that there was separate, distinct demurrer to count 11, and that that demurrer was overruled by the court,

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and that that particular ruling was affirmatively expressed in the judgment entry.

The last proposition (c) is also without merit; but it has an apparent support in ill-advised recent decisions of this court. The same decisions appear to have served to lead the Court of Appeals, which is statute-bound to follow this court, into like error in *Wheeler v. Fuller*, 4 Ala. App. 532, 535, 58 South. 792. The notion underlying the proposition (c) appears to be that where the assignment of error rests on action overruling a demurrer each *ground* or *cause* of demurrer must be well taken, else the action of the trial court will not be disturbed on appeal. The correct rule is that where a single assignment of error complains of two or more rulings on demurrers to *distinct* units of pleadings, such as counts, pleas, replications, or of distinct rulings on separate matters relating to the admissibility of evidence, or to distinct parts of the oral charge of the court, or to the giving or refusal of distinct special charges, or to other distinct matters occurring on the trial, the single assignment of error is considered and treated as *joining* each of the several rulings; and, if any one of such rulings is correct, the trial court will be justified, and the appellant will fail, for he will not have sustained his single averment of error in every one of the *rulings* he has *joined* in a *single* assignment.—*Western Ry. Co. v. Arnett*, 137 Ala. 414, 425, 34 South. 997; *Ashford v. Ashford*, 136 Ala. 631, 641, 34 South. 10, 96 Am. St. Rep. 82; *Brent v. Baldwin*, 160 Ala. 635, 640, 49 South. 343; *Cont. Cas. Co. v. Ogburn*, 175 Ala. 357, 57 South. 852, 854; *A. G. S. Ry. Co. v. Clake*, 145 Ala. 466, 39 South. 816.

A demurrer is an entity in pleading. Its grounds or causes are separate, not joint. They are particular reasons why the major premise of the demurrer should

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be made effective by the judgment of the court, specifications of defects in the pleading to which the demurrer is addressed. In nature the grounds or causes of a demurrer are similar to the grounds or causes set forth in a motion for new trial, or in objections to the admissibility of evidence. Patently a demurrer is due to be sustained *if any one* of its *grounds* or *causes* are well taken against the unit of pleading to which the demurrer is addressed. A motion for a new trial is due to be granted *if any one* of its grounds are well taken. So evidence should be refused admission *if any one* of the specified grounds of objection thereto is well taken.

When a ruling sustaining or overruling a demurrer, to a unit of pleading to which a demurrer may be addressed, is properly assigned for error on appeal, manifestly the trial court must be held to have erred in overruling a demurrer in which there is one or more grounds that were well taken; or the trial court must be held *not* to have erred in sustaining an appropriate demurrer if one or more grounds thereof were well taken.—*A. G. S. Ry. Co. v. Clarke, supra.* But this is very different from affirming that on appeal *every ground or cause* of the demurrer overruled by the trial court must be well taken before the appellant demurrant can claim the adjudgment of error in the premises. Such a conclusion would necessarily establish each *ground* or *cause* as a demurrer, thus revolutionizing the whole theory and nature of the demurrer, as we have it. In cases where a single demurrer (regardless of the number of grounds) is addressed, *without separation*, to two or more units of pleading, the trial court will overrule such a demurrer, unless all are demurrable on one or more of the grounds assigned to such units of pleading.

The proposition (c) of appellee appears to have received recognition in *Ferrell v. Opelika*, 144 Ala. 135,

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39 South. 249, *Aetna Ins. Co. v. Lasseter*, 153 Ala. 630, 45 South. 166, 15 L. R. A. (N. S.) 252, and in *Thompson v. N. C. & St. L. Ry. Co.*, 160 Ala. 590, 49 South. 340. In so far as these cases approve or apply a rule opposed to that we have stated as the correct one, they are unsound, and are, to that extent, overruled.

Now as to the form and effect of the assignment of error numbered 1, quoted before: The assignment is not a joint complaint, combining as a *single* affirmation of error, of the several grounds or *causes* of demurrer addressed to count 11. The first sentence in the assignment effected to present for review the propriety of the trial court's action in overruling the demurrer to count 11; and, in necessary consequence of the grounds or causes thereof being separate instead of joint, to propound the question: Was any one or more grounds of the demurrer to that count well taken? It follows that the second sentence in the assignment but reiterated the idea comprehended in the first sentence, which was to say: The court erred in overruling each separate ground of the demurrer to that count. So, to here sustain the assignment, it was only necessary for this court to conclude that the demurrer should have been sustained, which is to say: At least one ground of the demurrer was well taken, thereby finding error in overruling the demurrer.

The words (in the assignment) "complaint as last amended," precede transcript paging wherefrom it is made plain that the appellant could only have intended to complain, and does in fact complain, of the trial court's ruling in overruling the demurrer to count 11, interposed, separately, to that count after the complaint was *first* amended by adding counts 6 to 16, inclusive. Count 11, as before stated, was not changed during the trial. So our view is that the seeming in-

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consistency between the record, which shows no ruling on count 11 as it appeared (though never altered) in the *complaint as last amended* and the last words in the assignment was corrected by the pertinent contents of the transcript pages to which the assignment itself specifically refers.

The application is denied.

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Injury to Servant.

(Decided May 15, 1913. Rehearing denied June 19, 1913.
62 South. 804.)

1. *Master and Servant; Injury to Servant; Complaint.*—A complaint brought under an Employer's Liability Act should conform to the general rules of pleading in matters of certainty.

2. *Same.*—A complaint brought under the Employer's Liability Act, which merely alleges the injury and that it was caused by the negligence of the superintendent of the master is not sufficient, although it follows the language of subdivision 2, section 3910, Code 1907; the field of superintendence is a wide one, covering generally the master's business, and the mere allegation of the negligence of the superintendent does not give the master sufficient notice as to the matters charged.

3. *Same; Duty of Master.*—A servant is expected to exercise some degree of intelligence, and the instinct of self-preservation, and is held to assume all injuries connected with his employment against which he may protect himself by the exercise of ordinary care.

4. *Same; Evidence; Sufficiency.*—The evidence examined, and held insufficient to charge the master with negligence, either in superintendence or in furnishing defective appliances.

5. *Pleading; Conclusions.*—While conclusions may be pleaded, ordinarily they must be accompanied by averments of facts whereon issues can be understood and tried.

6. *Same; Certainty.*—Certainty to a common intent in pleading is essential to the due administration of justice, the adverse party being entitled to notice of the cause he must be prepared to meet.

7. *Appeal and Error; Harmless Error; Pleading.*—Where a cause is submitted to the jury on two counts, one alleging defective appliances, and the other the negligence of the superintendent of the master, the overruling of a demurrer to the count insufficiently alleging negli-

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gence of the superintendent, cannot be held harmless where there was a verdict for plaintiff, as there was nothing to show that the issues raised by the improper count where in any way eliminated.

(McClellan, J., dissents.)

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Action by W. A. Marbut against the Woodward Iron Company for damages for injury sustained while in its employment. Judgment for plaintiff and defendant appeals. Reversed and remanded.

CABANISS & BOWIE, for appellant. The complaint in so far as the count based on the negligence of the superintendent is concerned was insufficient, and demurrers should have been sustained thereto.—*Maddox v. Chilton W. & M. Co.*, 171 Ala. 216; *Whitmore v. Ala. C. & I. Co.*, 164 Ala. 125; *Whatley v. Zenida C. Co.*, 122 Ala. 118; *T. C. & I. Co. v. Smith*, 55 South. 170. The oral charge of the court was improper.—*Maddox v. Chilton W. & M. Co.*, *supra*.

STALLINGS & DRENNEN, for appellee. The count criticised is sufficient.—*A. G. S. v. Davis*, 119 Ala. 572; *Bear Creek M. Co. v. Parker*, 134 Ala. 293, and authorities cited.—*So. C. & F. Co. v. Bartlett*, 137 Ala. 234; *Bessemer L. & I. Co. v. Campbell*, 121 Ala. 57; *L. & N. v. Butler*, 55 South. 262. The case went to the jury on two counts, one of which was sufficient, and any error in overruling the demurrers was clearly without injury.

SAYRE, J.—This suit was brought under subsection 2 of the Employers' Liability Act (section 3910 of the Code). Count 4 alleged the relation between the parties out of which a duty arose, the nature and extent of plaintiff's injury, and that it was caused by "a certain-

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piece or particle of steel that flew with great force and violence from a cleaver when struck by a sledge hammer at the shops of defendant." It then concludes: "Plaintiff avers that his said injury and damage were caused by reason and as a proximate consequence of the negligence of a person in the service and employment of defendant, and intrusted by it with superintendence whilst in the exercise of such superintendence, to wit: Tom Cosper."

In our most recent case of the sort we held in respect to a similar count that, though it followed the language of the statute, it was subject to demurrer, because it failed to point out, even in general terms, any act of negligence on the part of the alleged superintendent with respect to his duty while so engaged.—*Maddox v. Chilton Warehouse Co.*, 171 Ala. 216, 55 South. 93.

In *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700, the fifth count of the complaint there under consideration, after alleging preliminary matter about which there was no question, showed plaintiff's injuries, and that they resulted from plaintiff being caught between two cars of the defendant. The averment which needs to be noticed in this connection was as follows: "And plaintiff avers that his said injuries were caused by reason of the negligence of Bill Simmons, who was then and there in the service or employment of the defendant, and was then and there intrusted with the superintendence of the train hands and loaders on defendant's said cars and the coupling thereof, and that said injury occurred while the said Bill Simmons was in the exercise of such superintendence." It was held that the count was not demurrable for failing to aver the facts relied on to constitute negligence. It is not impossible to find sensible differences between the question there presented and the one at hand. There

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the general, though loosely stated, effect of the averment was that defendant's superintendent was party to and negligent about the very act of coupling the cars between which palintiff was caught and hurt, whereas here the particular negligence is not pointed out, and defendant's superintendent may have been connected with the manual act charged in any of the manifold ways in which the master or his superintendent may have care, oversight, or superintendence of the master's business, and the demurrer in this case drew attention to this consideration. These remarks apply to the case of *Creola Lumber Co. v. Mills*, 149 Ala. 474, 42 South. 1019. But without dwelling on this point of difference between those cases and this, we will see to what result general principles of pleading and the analogy of other adjudications lead.

The rule of this court has been that a complaint under the Employers' Liability Act should, in respect of certainty, conform to those rules which under our system apply to pleadings generally. Those rules permit the averment of conclusions, but conclusions when employed must ordinarily be accompanied with averments of fact whereon issues can be understood, joined and tried.—*L. & N. R. R. Co. v. Jones*, 130 Ala. 470, 30 South, 586, citing *Leach v. Bush*, 57 Ala. 145, upon which have been planted all those numerous cases in which great generality in the averment of negligence has been accepted as meeting the requirements of good pleading.

Certainty to a common intent in pleading is essential to the due administration of justice, and it cannot be abolished. By certainty causes and issues are identified for the determination of jurisdiction, and thereby the protection of parties against repeated trials of the same case, the finality of elections of remedies, the comity of

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courts, and other conserving principles of procedure are assured.—2 Hughes on Prop. 474. And, to come nearer to the needs of the instant case, certainty in some degree is required to give adversary parties reasonable notice of what they must be prepared to meet, and to speed the disposition of causes under their merits.—*T. C. I. Co. v. Smith*, 171 Ala. 251, 55 South. 170.

By the adjudicated cases it appears that breaches of the duty of superintendence may take many various forms. Superintendence may cover the entire field of the master's business. There may be negligence on the part of a superintendent in the adoption of an improper method of doing the work in hand; the giving of improper directions with respect to particular details of the work; failing to furnish proper appliances; employing incompetent servants; allowing abnormally dangerous conditions to exist in the place of work; failing to give instructions under circumstances which indicate the propriety of doing so; failing to warn a servant of abnormal danger; or violating rules promulgated by the master. See 2 Labatt Mas. & Ser. § 687, where many illustrative cases are collected. Under the complaint in this case plaintiff might have proved any or all of the above-mentioned varieties of negligence. But their enumeration demonstrates the reason and necessity of the rule which requires the statement of facts, whereon issues can be joined, understood, and tried, in connection with the conclusion alleged.

In all the complaints under the statute which have passed muster in this court, so far as we are informed, not excepting *Bear Creek Mill Co. v. Parker*, *supra*, there have appeared averments designed and calculated to give the defendant at least an inkling of the facts constituting the particular character of negligence the plaintiff would undertake to prove at the trial. Thus

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in *A. G. S. R. R. Co. v. Davis*, 119 Ala. 572, 24 South. 862, much stressed by appellee, a count under the fifth subdivision of the act, which charged plaintiff's injuries to "the negligence of an engineer of defendant who then and there had charge or control of an engine of defendant" was held sufficient. But that, we take it, was because the averment informed the common understanding that the negligence occurred in the manual operation of the engine, and seems fair enough. So of other counts in the same case, framed under the first subdivision of the act, in which negligence was predicated upon the fact that there was "a defect in the track," though some members of the court were inclined to think too much indefiniteness and uncertainty characterized some of the counts.

In *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 South. 445, a count under the first subdivision, averring that "the said railway from which the said engine was derailed at or near the point of derailment was defective," was held good, the court saying that the term "railway" was used in the pleading merely to designate that from which the engine was derailed, and must in such use be construed as synonymous with "track." But it has been held all along that counts under that subdivision of the statute must specify the defect in defendant's ways, works, machinery, or plant of which they complain.—*Whatley v. Zenida Coal Co.*, 122 Ala. 118, 26 South. 124; *Whitmore v. Ala. Consol. Co.*, 164 Ala. 125, 51 South. 397, 137 Am. St. Rep. 31; *T. C. I. Co. v. Smith*, *supra*.

In *Southern Car Co. v. Bartlett*, 137 Ala. 237, 34 South. 20, relied upon by appellee, the count under the second division of the statute stated precisely what the superintendent had done, and wherein his negligence consisted, while those counts which were sustained

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under the third subdivision alleged the general tenor of the order given.

A considerable number of cases seem to fall indifferently under the second or third subdivision of section 3910, providing, respectively, for cases of negligence in the exercise of superintendence and cases in which the injured servant conforms to the orders or directions of another to whose orders or directions he is bound to conform. The two subdivisions are closely related, and decisions under one furnish a close analogy for cases under the other. In *Reiter-Connolly Co. v. Hamlin*, 144 Ala. 192, 40 South. 280, where a count under the third subdivision, alleging just what was done, and that it was done in obedience to particular instructions given by named agent of the defendant having authority in that behalf, was approved, the court, conforming its decision at once to the rule of *Leach v. Bush* and *L. & N. R. R. Co. v. Jones*, *supra*, said: The particular instructions given by Reiter are plainly stated, to wit, 'to slacken said chain.' This court has frequently held, in similar cases, that it is not necessary to aver in what particular or respect the orders or directions were negligent. The general averment that the orders 'were negligently given' covers the case."

We have had many cases on this subject. Without intending to depart from the clear rule of any of them, intending rather to follow them according to their true import, thereby following the clear rule of *Maddox v. Chilton Warehouse Co.*, *supra*, we hold the fourth count of the complaint in the present case fatally defective on apt demurrer, for the reason that it gave defendant no notice, even of a general character, of what act of negligence on the part of its superintendent the complaining party would offer evidence.

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It is no answer to the foregoing conclusion to say that the case had been once tried, and thereby defendant sufficiently informed, as appellee suggests. That suggestion would involve an impossible application of the doctrine of error without injury. In the absence of other pleading, stating substantially the same facts, suggesting and requiring the same evidence, or without some showing that the issues raised by the objectionable pleading have in some way been eliminated from the case submitted to the jury, this doctrine has never been allowed to cure error, in pleading, properly reserved; and, in view of the uses of reasonable certainty in all pleading, we apprehend it ought not to be allowed so to operate as the result of judicial decision. In this case there is nothing to rebut the inference of injury, and the judgment must be reversed for the error in overruling the demurrer to the fourth count.

This case went to the jury on counts 1 and 4. The gist of count 4 has been stated, and for the further purposes of this appeal it will be treated as having stated a cause of action under the superintendence clause of the statute. Count 1 proceeded under the first clause, followed the language of that clause, and concluded with the averment that "said cleaver was old, unfit, unsafe, and defective." By special instructions requested defendant reserved for review his contention that the evidence did not warrant a finding for plaintiff under either of these counts.

The evidence tended to show that plaintiff and a fellow servant were engaged in repairing an oil box on a slag car. To do this it was necessary to cut off the head of an iron or steel bolt. Plaintiff held the cutting edge of the cleaver against the bolt while his fellow was striking its head or thick end with a sledge hammer. Plaintiff held the cleaver by its handle, which was 2 or

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2½ feet long. The head of the cleaver had become burred by previous use; that is, the metal at its extremity had been mashed and caused to spread. A stroke of the hammer caused a flake or particle of steel to fly from the head of the cleaver into plaintiff's eye, eventually destroying the organ. There is in the evidence a suggestion of negligence on the part of plaintiff's fellow servant, the man with the hammer, but that does not appear to have been considered as of any consequence, as probably it was not, and will be put aside. Cosper was foreman of the shop, and to him, if to any one mentioned in the evidence, was intrusted the duty of seeing that defendant's ways, works, machinery, or plant there were in proper condition. Conceding that the cleaver was a part of defendant's plant (*Sloss-Sheffield Co. v. Mobley*, 139 Ala. 425, 36 South. 181; *Going v. Ala. Steel & Wire Co.*, 141 Ala. 537, 37 South. 784; *Huyck v. Mc-Nerney*, 163 Ala. 244, 50 South. 926; *Riddle v. Bessemer Co.*, 170 Ala. 559, 54 South. 525), the questions for decision, then, are whether on the evidence the cleaver could have been found to be defective, and, if so, whether Cosper was at fault in failing to see that it was not in proper condition.

Not the slightest reason appears in the evidence for suspecting the condition of the cleaver or its fitness for its designed use, when first brought into defendant's service less than a week before plaintiff was hurt. But at the time of plaintiff's injury the cleaver was burred, and the only possible hypothesis suggestive of negligence on the part of defendant, for which it could be held responsible under the statute, was that this burring was a condition which made the use of the cleaver dangerous. Without dispute the testimony went to show that burring was an evidence of the tool's original fitness for the use to which it was being put, and that on

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most reasonable grounds, if the testimony is to be credited. The edge of the tool is case-hardened, but the other end is left mild or soft, because mild steel, though it will burr, is tough, and to harden it would render it brittle and more liable to flake off under heavy blows, and thus cause accidents like that from which plaintiff suffered, and yet it must have some degree of hardness or it will not stand use. So it appears, slivers or particles of steel may fly however well the tool be prepared. And the testimony tends strongly to show that workmen pay no attention to the burr unless it needs to be trimmed so that the tool may be used in a close place. The tool is repaired from time to time by having its edge hardened and sharpened, but frequently it is used without knocking or dressing off the burr until its head is hammered down to the eye, when it is cast aside. However, since the burr is sometimes knocked, dressed, or trimmed off, possibly it was open to the jury to infer that this cleaver was at the moment unfit.

But, whatever may be the true state of the case in respect to the condition of the cleaver on the day when plaintiff took it for the operation upon which he was engaged and at the moment of his injury, there was no ground for a finding that it was defective in any respect except that it was burred. That, if a defect at all, was an obvious defect. Plaintiff was experienced in his line of work, and he neither averred nor proved that he needed any instruction in the use of the cleaver. He testified that he knew it was dangerous to use the cleaver with the burrs on it. He also testified that it was his duty, if the tool got out of repair, to take it to the blacksmith shop and have it repaired. All the mechanic's witnesses corroborated him as to that. True, he testified that the blacksmith never fixed the head of a cleaver while he was employed at defendant's shop, and that he

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had complained to Cosper, but at no time did he say that he had taken the cleaver in question to the blacksmith to be repaired, nor did he say that he had at any time requested the blacksmith to repair or dress the head of any cleaver, or complained of the particular tool as defective. True, also, defendant's blacksmith testified that the defendant company did not have anybody working for it to do that (meaning to dress the heads of cleavers), but the full and true meaning of this particular bit of testimony is clearly shown by his testimony elsewhere that in well-regulated shops in the Birmingham district they paid no attention to burrs on the head of a cleaver; that it was not customary to fix the heads of tools unless needed for use in a close place; that it was throwing away time to dress the head of a tool; but that "if a man brought a tool to us (meaning himself and his men, blacksmiths in defendant's shop) to dress the head, we will take it and heat it and cut those burrs off"—and more to the same effect.

The master is not required or expected to deal with his servant as with an automaton, as a person following a routine without intelligence. The servant may be expected to exercise some measure of intelligence and the instinct of self-preservation. It is a fair rule that 'a servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care.'—1 Labatt, Mas. & Ser. c. 4. In this case the servant was using a common tool of such sort that use inevitably produced and continually and rapidly added to the only defect the existence of which the evidence tended to prove. He was not put to the choice of using a defective instrumentality or quitting his employment. His duty was, if he did not choose to follow the frequent practice of mechanics by knocking off the burrs with a

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hammer, to take the cleaver to the blacksmith for repair. No rule of reason prevents the master or his superintendent, or any other person in his service, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition, from committing to the servant the duty of exercising ordinary prudence for his own safety as against an obvious danger which arises out of and grows with the servant's use and manipulation of a simple tool, or requires that the master shall undertake to do for the servant what the servant may do for himself to the better advantage of both. This we hold without intending to question those previous decisions of this court in which it has been held that unadapted and inadequate, though more or less simple, instrumentalities constituted defects in ways within the meaning of the statute. Plaintiff's duty was, in a certain most just sense, to remedy the defect complained of; that is, it was his duty to observe the defect when it appeared and take it to the blacksmith for repair. In this he failed according to his own showing, and thereby he was derelict in a duty which the principles of the common law imposed upon him, and which the statute has not displaced. The defect in the cleaver, therefore, if it was defective, must be laid to the remissness of the plaintiff rather than to the negligence of defendant, his employer. Construing the testimony with all reasonable favor to appellee, he was not entitled to a verdict on either count.

Reversed and remanded.

ANDERSON, MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. McCLELLAN, J., dissents as to the ruling on count 4. His views are expressed in *Cahaba Coal Co. v. Elliott*, *infra*, 62 South. 808. DOWDELL, C. J., not sitting.

[Sloss-Sheffield Steel & Iron Co. v. Webster.]

Sloss-Sheffield Steel & Iron Co. v. Webster.

Injury to Servant.

(Decided May 15, 1913. 62 South. 764.)

1. *Master and Servant; Injury to Servant; Pleading.*—A plea setting up that the injured servant knew of the defect complained of, but did not inform the master within a reasonable time states a good defense under section 3910, Code 1907; the fact that the master knew of the defects, being an exception, was matter to be set up by replication.

2. *Pleading; Duplicity.*—A plaintiff cannot complain that a plea to the merits is double.

3. *Appeal and Error; Transcript; Time of Filing.*—Where the record in a cause is filed at the first call of the division to which the county belongs after the appeal is taken, the appeal will not be dismissed because the record was not filed within twenty days after the taking of the appeal.

4. *Same; Harmless Error; Pleading.*—Where a miner was injured by the fall of rock, and the evidence tended to show that it was caused either by a defect in the props or the track, or a defect in the car which struck the props, the sustaining of the demurrer to a plea setting up the servant's failure to promptly notify the master of the defect in the track, cannot be held to be harmless.

APPEAL from Walker Circuit Court.

Heard before Hon. J. J. CURTIS.

Action by W. P. Webster against the Sloss-Sheffield Steel & Iron Company for damages for injuries received while in its employment. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The judgment was rendered December 11, 1912. The appeal bond was filed January 30, 1913. The bill of exceptions was presented on March 10, 1913, and filed with the clerk, March 11, 1913, and the cause was filed in this court April 21, 1913. Counsel for appellee moved to dismiss on the ground: First, that the appeal was discontinued; second, appellant failed to file the transcript within the time allowed by law for filing same,

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and because it was not filed within 20 days after February 5, 1913. The plaintiff sued for injuries caused by the fall of a rock, alleged to have been knocked down by a tram car striking a prop or post, and in two counts the defect was alleged to be in the car, and in the other two the defect was alleged to be a defect in the track; both being alleged to be a part of the ways, works, etc., of the defendant. The tenth plea, referred to in the opinion, is as follows: "Defendant says that plaintiff was guilty of negligence which proximately caused his injury in this: That he knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master, and further alleges that it was the duty of the plaintiff to remedy the defect complained of, and that defendant did not know of the defect or negligence complained of."

BANKHEAD & BANKHEAD, for appellant. The court erred in sustaining demurrers to plea 10.—*L. & N. v. Wilson*, 162 Ala. 588. The fact that the master knew of the defect, was an exception and should have been brought forward by replication.—*So. Ry. v. McGowan*, 149 Ala. 453; *Thomas v. Bellamy*, 126 Ala. 253.

ACUFF & FINCH, for appellee. On the motion to dismiss the appeal counsel cite section 2870, Code 1907; *Swain v. State*, 60 South. 960; *Powell v. State*, 59 South. 328; *So. Ry. v. Abraham*, 161 Ala. 317; *Porter v. Martin*, 139 Ala. 318. Plea 10 was bad and the court properly sustained demurrer thereto.—*Jackson L. Co. v. Cunningham*, 141 Ala. 206. All matters contained in the qualifying clause of the statute are matters of defense, and must be set up by the plea.—*Broslin v. K.*

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C. M. & B., 114 Ala. 398; *Columbus v. Bradford*, 86 Ala. 574; *N. C. & St. L. v. Hines*, 59 South. 668. In any event, it was error without injury.—*Union F. Co. v. Johnson*, 150 Ala. 159; *Creola L. Co. v. Mills*, 149 Ala. 474.

ANDERSON, J.—While the record in this case was not filed in this court until the spring call of the sixth division, and after the first Monday after the expiration of 20 days from the date of taking the appeal, yet it was filed at the first call of the division to which it belongs (the sixth division) after the appeal was taken, and the motion to dismiss the appeal is overruled.—*National Union v. Sherry*, 180 Ala. 627, 61 South. 944.

Section 3910, among other things, says; “the master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless the master or employer, or such superior, already knew of such defect or negligence.” It seems that the master or employer sets up a good defense when he avers that the servant was aware of the defect or negligence complained of, and failed within a reasonable time to inform the master or some person superior to himself of same. It is true the statute relieves the servant from informing the master if the master already knew of same, but knowledge of the master or superintendent need not be negatived in the plea, but is affirmative matter that must be pleaded and proven by the plaintiff, and should be brought forward by a replication. This identical question was so decided in the case of *L. & N. R. R. Co. v. Wilson*, 162 Ala. 588, 50 South. 188 (see

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plea 3). It is true, that there was division among the judges, but the holding of the majority must be followed as the law which controls the case at bar. We, therefore, hold that the trial court erred in sustaining the demurrer to defendant's original plea 10.

It is true that this plea contained more than plea 3 did in the *Wilson Case*, *supra*, by charging that it was the plaintiff's duty to remedy the defect, but this was something of which the plaintiff could not complain. Nor did it render the plea subject to demurrer for duplicity, even if the plea was duplex, which we do not decide.—*L. & N. R. R. Co. v. Gray*, 154 Ala. 156, 45 South. 296.

We are not impressed with appellee's suggestion that this court can say that this error was without injury. It may be that the defendant's superintendent knew that the track was too close to the prop, or that the plaintiff had put the prop too close to the track, but it would be questionable if the latter was a defect in the track chargeable to the master, a question, however, that we do not decide; for, if the defendant's contention be conceded in this particular, the fact remains that there was proof from which the jury could have inferred that the injury proximately resulted from a defect in the car, and not in the track, and the undisputed evidence does not show that the defendant or its servant knew of the defect in the car. The complaint, first and last, contained 27 counts, but all of which were eliminated except counts A, F, G, and N, two of which charged a defect in the track, and the other two charged a defect in the car, and there was proof from which the jury could infer that a defect in the car caused it to knock out the prop, and thereby caused the rock to fall upon the plaintiff. Neither did the other special

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pleas, to which no demurrer was sustained, fully cover the defense set up in plea 10.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Caldwell-Watson F. & M. Co. v. Watson.

Injury to Servant.

(Decided January 23, 1913. Rehearing denied May 13, 1913.
62 South. 859.)

1. *Master and Servant; Injury to Servant; Defect in Machinery; Jury Question.*—Under the evidence in this case it was a question for the jury whether there was a defect in the machinery of the master which is alleged to have caused the injury to the servant.

2. *Same; Defect in Machinery.*—Under subdivision 1, section 3910, Code 1907, an instrumentality used in the business of the master not in proper condition for the purpose for which it is applied is defective, although each part may be sufficient.

3. *Same; Burden of Proof.*—In an action for injury to servant because of defects in the ways, works, etc., the burden is on plaintiff not only to show the existence of the alleged defect, and that it was the proximate cause of the injury, but that the defects arose from or had not been discovered or remedied owing to the negligence of the master, or of some person in his service; where, however, the defect is shown to be structural, and such as renders it unsafe, it may be inferred that the master was aware of it, especially where the machine was constructed by him.

4. *Same; Care Required.*—The law does not require a master to use the best possible appliances, and he may show that they were such as were adopted and used by prudent persons in the same business; this fact is not conclusive, however, that the machine is not defective, and does not necessarily relieve the master from liability.

5. *Same; Evidence; Defect.*—Where there was evidence that the machinery used in the master's business was unsafe or insufficient, proof that such machines were generally used by prudent persons in the same business was admissible, to rebut negligence.

6. *Same; Instructions.*—A charge asserting that even if the hydraulic press mentioned in the complaint was defective, plaintiff could not recover unless such defect could have been discovered by such an inspection, as an ordinarily prudent person engaged in the same business would have given it, and unless defendant was negli-

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gent in failing to make such inspection, pretermitted the fact that the press was constructed by the defendant, thus charging him with notice of inherent defects not discoverable upon ordinary inspection, and was hence, properly refused.

7. *Same*.—A charge that if defendant's hydraulic press built by him was built according to the plan of similar presses sold by reputable dealers, and used by persons engaged in similar business, and if defendant had no knowledge of any defect therein, plaintiff could not recover, was properly refused as the law charged defendant with notice of any defect in the press.

8. *Same*.—A charge asserting that if the master was guilty of no negligence in the manufacture of the hydraulic press, plaintiff could not recover, was properly refused, as the press may have been actually made in the most skillful manner, and yet have been unsafe for the purposes for which it was made.

9. *Same; Jury Question*.—The question of defendant's negligence in furnishing the press was for the jury, there being evidence that it was defective, although there was evidence that other well regulated plants used the same kind of hydraulic pressure, and undisputed evidence that the press had never before caused an accident, although operated for years.

10. *Charge of Court; Argumentative*.—It is proper to refuse instructions which are argumentative.

11. *Same; Cured by Other Instructions*.—An instruction that it was the duty of the master to furnish an employee a reasonably safe place to work in, and reasonably safe appliances to work with, and to keep them in a reasonably safe condition, was not misleading when considered with the further instruction that defendant was bound to use only reasonable care as to the construction of the machine.

12. *Evidence; Opinion Evidence*.—Witnesses who had never constructed hydraulic presses like one alleged to be defective, but who were master mechanics of many years' experience, and familiar with hydraulic presses and machines, and with the general construction and repair of such machines as well as with making and plugging holes, were qualified to give their opinion whether the press in question was defective.

13. *Appeal and Error; Harmless Error; Instruction*.—An instruction by the court that plaintiff claimed the right to recovery because defendant negligently allowed the machine to become defective, even if it was properly constructed, was a mere statement of plaintiff's contentions, and instructed no finding thereon; hence, defendant was not prejudiced thereby, even if plaintiff's claim was not supported by the evidence.

(Mayfield, J., dissents in part.)

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by Frederick Watson against the Caldwell-Watson Foundry & Machine Company, for damages for

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injury received while in its employment. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts of the case sufficiently appear from the opinion.

The following charges were refused the defendant:

“(2) If you believe from the evidence in this case that the defendants exercised such care in furnishing a hydraulic press as any other reasonably prudent employer would have exercised under similar circumstances, you cannot find that they were negligent in or about furnishing or maintaining the hydraulic press, a part of which injured plaintiff.”

(4) If you believe the evidence in this case, the defendant’s hydraulic press was not defective within the meaning of the Employer’s Liability Act.”

(6) Affirmative charge as to the first count.

“(1) If you believe the evidence in this case, you cannot find that the defendant was negligent in or about furnishing plaintiff a reasonably safe place in which to work.

“(8) If you believe from the evidence that the said pin mentioned in the evidence was made by defendant in a proper manner, according to the plan and pattern of a well-regulated and reputable manufacturing concern engaged in the manufacture of hydraulic presses, then the plaintiff cannot recover merely on account of the fact, if it be a fact, that the collar of said pin was only the thickness shown by the evidence.”

“(1) I charge you that, even if you believe from the evidence that the hydraulic press mentioned in the complaint was defective, you cannot find for the plaintiff unless you are reasonably satisfied from the evidence that this defect could have been discovered and remedied by such an inspection as an ordinarily prudent person engaged in the business in which the defendants

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were engaged would have given it, and also that the defendants were negligent in failing to make such inspection."

"(3) If you believe from the evidence that defendants were guilty of no negligence in the manufacture of the press described in the complaint, you must find for the defendant."

"(9) If you believe from the evidence in this case that the defendant's hydraulic press was built in accordance with a plan by which similar presses sold by reputable dealers in such articles and used by persons engaged in a business similar to that in which defendants were engaged when plaintiff was injured, whose business was well conducted, and that defendant had no knowledge of any danger that might arise from said press, or of any defect therein, you must find for the defendant.

"(10) If a master builds a machine in accordance with the plans by which machines have been built by reputable manufacturing concerns, and used by reputable persons engaged in a business similar to that of the master, and which served the purpose for which they were built without accident and in a satisfactory manner for 10 years or longer, the master is not liable for an injury caused by the breaking of the machine, after it had been used 10 years, if no defect existed therein which could have been detected by a reasonable inspection at the time of the breaking, and which was not present when it was manufactured."

The second part of the oral charge excepted to is as follows:

"Now, the plaintiff claims the right to recovery because they say, even if it was properly constructed in the first instance, that they negligently allowed it to get into a defective condition, and that by reason there-

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of the plaintiff suffered damages because of their alleged negligence in that particular."

The third exception is as follows:

"Now, upon that point, I want to say right here that where the relation of master exists, as it is sometimes called, employer and employee, as is claimed in this case, it is the duty of the master or employer to furnish to the employee a reasonably safe place to work in, and reasonably safe tools, appliances, or instruments to work with, and keep them in a reasonably safe condition."

TILLMAN, BRADLEY & MORROW, CHARLES E. RICE, and P. P. WALDROP, for appellant. By the terms of the act, only a defect in the condition of the machine, as a result of which it fails to safely perform the function for which it was designed, is included and contemplated. It does not include a defect in the design or type of a machine in general use by well-regulated concerns.—1 Dresser, 207, et seq.; 42 N. E. 112; *Huyck v. McNerny*, 163 Ala. 244; *Sloss-Sheffield v. Smith*, 166 Ala. 437. The Employers' Liability Act did not create a new cause of action or take away any existing remedy, but was passed solely to take from the master in the cases mentioned in the act, the common law defense of negligence of a fellow servant.—1 Dresser, secs. 2-38; 2 LeB. sec. 666; *Laughran v. Brewer*, 113 Ala. 507, and cases cited; *Tutwiler C. & C. Co. v. Farington*, 39 South. 898; *Sloss-S. S. & I. Co. v. Mobley*, 139 Ala. 425. The appellant is responsible for the consequences of negligence, but not of danger, and from the evidence, it cannot be reasonably inferred that appellant was negligent.—1 Dresser, 194; 67 S. E. 359; 20 Atl. 517. Plaintiff cannot recover for any defect arising after the manufacture of the press in question.—*L. & N. v. Lowe*, 158

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Ala. 493; *L. & N. v. Campbell*, 97 Ala. 152; *L. & N. v. Allen*, 78 Ala. 503. The duty is to use reasonably safe appliances, such as are used by prudent persons in a well regulated establishment in the same business.—*Ga. Pac. v. Propst*, 83 Ala. 527; *Wilson v. L. & N.*, 85 Ala. 272; *R. & D. R. R. Co. v. Bivins*, 143 Ala. 146; 1 LeB. 110; 98 N. Y. 562; 84 N. Y. 455, and authorities supra. The court erred in admitting the opinion of mechanics as to whether the press was properly constructed.—1 Wig. sec. 555; 57 N. E. 759; 98 Fed. 52; 106 N. W. 364; 27 N. E. 358. The following cases seem to us to condemn the question under consideration:—*Ferguson v. Hubbell*, 97 N. Y. 513; 20 N. Y. Appeals, 346; *Pacheco v. Judson Mfg. Co.*, 45 Pac. 834; *State v. Stevens*, 92 N. W. 422-3; *Read v. Valley, L. & C. Co.*, 92 N. W. 622-3; *Schlender v. C. & S. T. Co.*, 97 N. E. 325-6; *Roscoe v. M. St. Ry. Co.*, 101 S. W. 36. Assuming that the witnesses were competent to repair a press, we do not believe that this qualifies them as experts to testify as to the type of a press.—*Paul E. Wolfe Shirt Co. v. Frankenthal*, 70 S. W. 381; *Matthews v. Farrell*, 37 South. 329; *Neyman v. A. G. S. R. R. Co.*, 57 South. 435. The question invades the province of the jury and should not have been allowed.—*Walshe M. Co. v. Lumber Co.*, 59 South. 460; *L. & N. v. Bogue*, 58 South. 394.

ALLEN & BELL, for appellee. The defect complained of was a defect under the first subdivision of the Employers' Liability Act.—*K. C. M. & B. v. Burton*, 97 Ala. 240; 2 LeB. sec. 670; Dresser, sec. 39. Under the evidence whether the machinery was defective was a question for the jury.—*R. & D. R. R. Co. v. Weems*, 97 Ala. 270; *Davis v. Korman*, 141 Ala. 479; *L. & N. v. Jones*, 130 Ala. 456; *Prattville C. Mills v. McKinney*, 59 South. 498; *Jackson L. Co. v. Cunningham*, 141 Ala.

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206. We invite the court's especial attention to the rule laid down in the case of *Sloss-Sheffield v. Mobley*, 139 Ala. 425; *West P. C. Co. v. Andrews*, 150 Ala. 368; *New C. C. & C. Co. v. Kilgore*, 162 Ala. 642; *Pell City v. Cosper*, 55 South. 214.

ANDERSON, J.—This case was tried upon count 1 of the complaint, and which is a defect count, under subdivision 1 of section 3910 of the Code of 1907, and is predicated upon a defective hydraulic press, which was a part of the defendant's plant or machinery, etc. The plaintiff's evidence tended to show that he was injured by a pin, plug, or screw, which flew out and hit him on the leg, fracturing the bone, and that there was an inherent defect in said press, in that it contained a certain hole which was not necessary, or, if necessary, that it could have been forced instead of straight, and would have been safer from producing accident than the one in question. There was also evidence that the pin or plug was not put in in a workmanlike manner. This furnished evidence from which the jury could find that there was a defect in the ways and works, etc., and for which the master was responsible, if it arose from negligence, either in furnishing a defective instrumentality or failing to remedy or repair same.

In 2 Labatt on Master & Servant, p. 1963, § 670, it is said: "Wherever an instrumentality is not in a proper condition for the purpose for which it was applied, there is a defect in its condition within the meaning of the act. If the whole arrangement of a machine is defective for the purpose for which it is applied, there is a defect so as to bring it within the act, although each part may be sufficient. It follows therefore, that whenever there is such an unsuitableness for the work intended to be done and actually done, the liability con-

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templated by the statute arises although the appliance is perfect of its kind and in good repair and suitable for other kinds of work. In such case the employer is in fault because he has furnished appliances for a use for which they are unsuitable, and in effect in so ordering and carrying on his work that, without fault on the part of an ordinary workman, the natural consequences will be that the appliance will be used for purposes for which it is unsuitable."

In Dresser on Employers' Liability, § 39, p. 206, it is said: "The question is whether the fact that the machine was unfit for the purpose for which it was applied constitutes a defect in its condition. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the act. The argument of the defendant comes to this: That if the employer has a machine one part of which is weaker than it ought to be, there is a defect in its condition, but if the whole machine is too weak for the purpose for which it is applied, there is no such defect. Could it be said, if a windlass only for raising a bucket is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machinery must be a condition that relates to the purpose for which it is applied."

In line with the above is the language of McClellan, J., in *K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240-246, 12 South. 88, 91: "There must be some inherent condition of a permanent nature of the ways, works, machinery, or plant which unfits the thing for its uses; some weakness of construction with reference to the proposed uses (as where the ordinary appliances for drawing buckets of water from a well are used to lower and hoist men); some inadaptation to its purposes

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(as where the sides of a coke lift are not sufficiently fenced to safely hoist its burden.—*Heske v. Samnelson*, 12 L. R. [Q. B.] 30) ; some break or misplacement of the parts, or the absence of some part; some innate abnormal quality of the thing which renders its use dangerous (as the viciousness of a horse constituting 'plant' in the business of a wharfinger.—*Yarmouth v. France*, 19 L. R. [Q. B.] 647) ; some obstacle in the way of use, or obstruction to the use, which is a part of the thing itself, or of the condition of the thing itself, as holes in or ice upon a way, or the like—to constitute a defect in the ways, works, machinery, or plant under the statute."

There can be no doubt of the soundness of the proposition that the burden of proof is upon the plaintiff, not only to prove the existence of the alleged defect, and that the said defect was the proximate cause of the injury, but also that the defect arose from or had not been discovered or remedied owing to the negligence of the master or employer, or some person in his service.—*L. & N. R. R. Co. v. Lowe*, 158 Ala. 393, 48 South. 99. When, however, the defect in an appliance is shown to be structural, and as of such character as renders it unsafe, it may be inferred that the master was aware of the defect, especially when the machine or instrumentality was constructed by him.—26 Cyc. 1144; *Jasper v. Barton*, 1 Ala. App. 472, 56 South. 42.

The law does not require the master to use the best possible appliances; he may show that they were such as were adopted and used by many prudent persons engaged in the same business, yet this fact does not necessarily exempt the employer from liability.—*Prattville Cotton Mills v. McKinney*, 178 Ala. 554, 59 South. 598; *Davis v. Kornman*, 141 Ala. 479, 37 South. 789. The fact that others in the locality made and used

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presses like the one in question is a very pertinent fact on the inquiry of negligence vel non on the part of these defendants, but is not conclusive that said machine was not defective.—*Going v. Ala. Co.*, 141 Ala. 537, 37 South. 784. We do not understand this rule to be opposed by the cases of *Georgia Pac. R. R. Co. v. Propst*, 83 Ala. 526, 3 South. 764, and *L. & N. R. R. Co. v. Allen*, 78 Ala. 494, as those cases correctly lay down the rule that the master need not adopt every new invention, and it is sufficient if he uses those in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. They do not hold that such a fact is conclusive evidence against all defects in the instruments, machines, or works so used, as others may be remiss in the selection and use of their machinery, instruments, etc.

We think the holding means, where evidence is shown that the ways and works of the defendant are unsafe, or insufficient, that proof that similar instruments are generally used by other prudent persons engaged in similar calling is evidence in rebuttal, and might influence the jury in holding that there was no negligence, but such proof would not, as matter of law, conclusively show that there was no negligence in the selection or use of such machinery or instrumentality. There was no error in refusing charges 2, 4, 5, 6, 7, and 8, requested by the defendant.

There was no error in refusing charge 1, requested by the defendant. If not otherwise bad, it pretermits the fact that the press in question was constructed by the defendant, and such being the case, it was chargeable with notice of inherent defects, although latent and not discoverable upon an ordinary inspection.

Charge 9, requested by defendant, if not otherwise bad, was abstract, as the law charged the defendant

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with notice of any defect arising out of the manufacture of the press, as it was manufactured by it.

Charge 10 was argumentative, if not otherwise bad.

Charge 3, requested by the defendant, if not otherwise bad, is misleading, as the jury may have been influenced thereby to find for the defendant, unless there was negligence in the manufacture of the press. The press may have been actually manufactured in a most skillful manner, and yet be an imperfect or unsafe machine for the purpose for which it was installed and used by the defendant. In other words, the type or some of its component parts may have been imperfect, and yet the machine may have been constructed and put together in a most workmanlike and skillful manner.

The second part of the oral charge excepted to was a mere statement of one of the plaintiff's contentions, and it instructed no finding upon said contention, and the defendant was not thereby injured, even if the claim was not supported by the proof, but which fact we need not determine.

It is no doubt a sound proposition of law that the master is only required to exercise reasonable care and skill in furnishing the servant a reasonably safe place or tools, and that it is not an imperative duty to insure the place or tools, and so much of the oral charge as is involved in the third exception would have been better had it stated that it was the duty of the master to exercise reasonable care to furnish a reasonably safe place, instead of saying that it was his duty to furnish a reasonably safe place, yet, when this part of the charge is taken with the whole oral charge, as set out, we think that the duty of the master was properly set out, and that the jury could not have been misled by this part excepted to by the defendant.

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The defect complained of was in the hydraulic press, and the court had previously emphasized the fact that defendant had to use only reasonable care as to the construction of same, and that the only duty in this regard was to exercise reasonable care.

A sufficient predicate was laid for the opinion evidence of Ball and Frank. They had, perhaps, never constructed presses like the one in question, but they were both master mechanics of many years' experience, and were familiar with hydraulic pressure and machinery, and with the general construction and repair of machinery, as well as with making and plugging holes.

There was no error in refusing the motion for a new trial.

The judgment of the city court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

ON REHEARING.

ANDERSON, J.—Appellant contends, while proof that other well-regulated plants or works used the press in question may not be conclusive that the defendant was not guilty of negligence, that said fact, when taken in connection with the undisputed evidence that this press never before caused an accident though operated for years, should, as matter of law, exonerate the defendant; that to hold otherwise would make the defendant an insurer of the safety of its machinery, and exact a higher duty than the law requires. We confess that this circumstance should strengthen the defendant's contention, but the question should be left to the trier of facts, the jury, to determine whether or not the de-

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fendant was guilty of negligence in furnishing the press in question, and which would not necessarily make it an insurer, as there was evidence that the press was defective notwithstanding it was the same kind used by others, or may have never before injured any one. The defendant had to exercise reasonable care in furnishing a reasonably safe press, and, being a manufacturer of the machine in question, the jury could have inferred that it knew that a safer and better one could be furnished, and the fact that others used the same kind did not, as matter of law, justify the defendant to use the one in question until some one got hurt. Nor does this holding necessarily make the master an insurer of the safety of its servants or its machinery. While the law does not require him to furnish the best and most modern press, yet when there is evidence that the one in question was defective, it becomes a question for the jury to decide as to whether or not he should not have furnished another one, notwithstanding the same type may have been used by others, and not have waited until after it injured a servant. As above stated, the fact that others used this type, and that it had been safely operated for years, was a strong circumstance to be considered by the jury, but did not, as matter of law, acquit the defendant of negligence.

The application for rehearing is overruled.

MCCLELLAN, SAYRE, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. MAYFIELD, J., dissents. DOWDELL, C. J., not sitting.

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Stewart v. Nashville, C. & St. L. Ry.

Injury to Servant.

(Decided January 17, 1913. Rehearing denied February 6, 1913.
61 South. 73.)

1. *Master and Servant; Injury to Servant; Liability.*—Where a locomotive engineer while operating his engine at night discovered another engine, with headlight burning, about 40 yards ahead, which was on a spur track, but which he supposed to be on the main line, and that a collision was imminent, leaped from his engine, and was injured, he cannot recover for the injury resulting upon the theory that the company was negligent in failing to warn him of the spur track, or in leaving the engine on it so close to the main line as to deceive him, or in not screening or extinguishing the headlight of such engine, since it was stationed a safe distance from the main line.

2. *Same; Assumption of Risk; Apparent Danger.*—Under the facts in this case, the engineer must be held to have assumed the responsibility of determining for himself what he would do for his own safety where he misjudged ordinary and usual conditions which were not in fact at all dangerous.

APPEAL from Madison Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Homer Stewart against the Nashville, Chattanooga & St. Louis Railway for damages. From a judgment for defendant on demurrers, plaintiff appeals. Affirmed.

The original complaint contained three counts. Plaintiff's case against defendant was founded upon the following facts: Plaintiff was locomotive engineer in the service of the Southern Railway Company on its main line between Tuscumbia, Alabama, and points in Tennessee beyond Stevenson, Ala. Between the latter point and Chattanooga, Tenn., the Southern Railway Company "habitually and lawfully made use of the track" of the defendant company, a common carrier operating its own cars over the same track. Plaintiff, while run-

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ning his engine at a speed of about 20 miles an hour over said section of defendant's line in the nighttime, as he approached a curve on the said main line of the defendant company, suddenly discovered, about 40 yards in front of him, the headlight of another engine, which, on account of the curve, appeared to plaintiff to be on the main line. This apparition, as is alleged, produced upon plaintiff the impression that a head-on collision was imminent and unavoidable, as it would, in fact, have been had the strange engine been on the main line; whereupon he was "seized with dismay and fright, and, as the only mode of escape from his peril and danger, plaintiff jumped from his engine, while in motion, as aforesaid, to the ground, alighting on his feet with force and violence, and from the impact with the ground plaintiff was injured in his feet and legs by the concussion, and his feet and legs were thereby injured, by contusion, bruises, strains, and sprains," etc.

The first count alleges that the strange engine was not in fact on the main line, but upon a spur track, which left the main line on the outside of the curve, and the plaintiff was ignorant of the existence and use of the spur. The negligence counted on is the failure of defendant to inform plaintiff of the building of the spur.

After showing the same facts as the first count, the second and third counts show that the strange engine was about five feet from the main line, and the negligence counted on in the second count is the failure of defendant to remove it from such close proximity to the main line as to prevent the false appearance of its being actually upon it; while the negligence counted on in the third count is the failure of the defendant to screen or extinguish the headlight of said engine, so that it would not deceive plaintiff as it did.

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Five additional counts were added to the complaint by way of amendment. Of these, counts 4, 5, and 6 do not differ in substance and effect from counts 1, 2, and 3, respectively. Counts 7 and 8 charge the same breaches of duty as counts 1 and 2, respectively, but are fuller in their averments of the facts. They aver in particular that plaintiff's employer, the Southern Railroad Company, was using the said section of defendant's line under a contract of hire, by which all trains, engines, and employees of the Southern Company, while running on defendant's said line, were run and handled by the orders and under the full control of defendant; and that at the time of his injury plaintiff was running by defendant's orders and under its control.

Eleven grounds of demurrer were interposed to each and every count severally and separately, and the trial court sustained the demurrer, or demurrers, generally to each count.

JAMES H. BRANCH, and KIRK, CARMICHAEL & RATHER, for appellant. The Southern Railway having been allowed to use defendant's track at the point where the injury occurred, defendant owed the employees of the Southern Railway the same duty that they owed their own employees.—*C. of Ga. v. Martin*, 138 Ala. 531; *Wood v. Lock*, 147 Mass. 604; 1 Dresser 479; 164 Ind. 470. The duty to warn of the construction and use of the spur track was on defendant.—*L. & N. v. Hall*, 87 Ala. 708; *L. & N. v. Banks*, 104 Ala. 508; *N. B. S. Ry. Co. v. Wright*, 130 Ala. 419; *Robinson M. Co. v. Tolbert*, 132 Ala. 462; *L. & N. v. Boland*, 96 Ala. 626; 1 Dresser 462; 4 Thomp. on Neg. pp. 291 and 767; 47 N. W. 665. On these authorities, the court was in error on its ruling on the complaint. Employees do not assume the risk

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increased or caused by the employer's negligence.—*L. & N. v. Stutts*, 105 Ala. 368; *Postal T. Co. v. Hulsey*, 132 Ala. 444; *So. Ry. v. Howell*, 135 Ala. 639; *L. & N. v. Baker*, 106 Ala. 624; *N. Ala. v. Shea*, 37 South. 797; *Wes. of Ala. v. Russell*, 144 Ala. 142; *Ga. Pac. v. Davis*, 92 Ala. 300. One exposed to sudden and unexpected danger is not responsible for acting without judgment or wildly, and whether he so acts depends materially upon the facts and circumstances surrounding him, as he sees them.—*Postal T. Co. v. Hulsey*, *supra*; *B. R. & E. Co. v. Butler*, 135 Ala. 388; *Pearson L. Co. v. Hart*, 144 Ala. 239.

SPRAGINS & SPEAKE, for appellee. But little argument is necessary on the propositions here involved, and the following authorities will be found to uphold all the rulings of the trial court on which error is sought to be predicated.—*Wes. Ry. v. Mutch*, 97 Ala. 199; 144 Ala. 143; 146 Ala. 285; 149 Ala. 613; 155 Ala. 253; *Knowles' Case*, 129 Ala. 410; 109 U. S. 378; 114 Ala. 398; 121 Am. St. Rep. 526; Bailey on Master and Servant, pp. 158, 166 and 181.

SOMERVILLE, J.—The plaintiff, a locomotive engineer in the service of the Southern Railway Company, while operating his engine at night over a section of the defendant's main line, used by his employer under an agreement with defendant, discovered, about 40 yards ahead of him, another engine with headlight burning, supposing it to be on the main line, and a collision with it imminent, was seized with fright, leaped from his engine, and was injured. It is alleged that plaintiff's inference and his fright, and his effort to escape from the supposed peril, were, under the circumstances, reasonable and proper; and that his injury was

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due to defendant's breach of duty owed to him in not warning him of the existence and use of the spur track, or in leaving its engine so close to the main line as to deceive him, or in not screening or extinguishing the engine's headlight.

We are referred by counsel to no precedent for a recovery in such a case as this, and our own researches lead us to conclude that the case is one of first impression in the courts. If plaintiff is entitled to recover, it can only be because defendant has violated some duty owed to him in the premises.

We are referred by plaintiff's counsel to the doctrine which justifies one who is assaulted by the willful act of another to act reasonably upon appearances, and to do in defense what a reasonable man would do under like circumstances; and, again, to the right of recovery for a civil assault, when one is put in fear by an apparent demonstration of force, although there was no intent to harm, and no danger of harm in fact. Reference is made, also, to the doctrine that one who is, by the wrongful or negligent conduct of another, in violation of a duty owed him, brought into sudden peril, and who in the effort to escape it, acts wildly and runs into danger and is injured, although cool circumspection would have enabled him to choose a safe escape, is nevertheless not barred of his recovery by reason of contributory negligence, if his conduct was that of an ordinarily prudent man under such circumstances.—*L. & N. R. R. Co. v. Thornton*, 117 Ala. 274, 23 South. 778; *Postal Telegraph Co. v. Hulsey*, 132 Ala. 447, 31 South. 527; *Pier-son Lumber Co. v. Hart*, 144 Ala. 239, 39 South. 566. In the first two instances, however, there is a willful breach of an unquestionable duty not to put any one in fear by any demonstration reasonably calculated to do so; and in the last there is *actual* peril to the plain-

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tiff resulting from a breach of the defendant's specific duty not to thus cause him an injury.

The case of *B. R. & E. Co. v. Butler*, 135 Ala. 388, 33 South. 33, is more nearly in point. There a passenger sued the carrier company, and the complaint alleged in the alternative that the defendant's servant caused another of its cars "to appear to be in imminent danger of collision" with the car on which plaintiff was riding, whereby he was caused to jump, to his injury. On demurrer, it was held that, to state a cause of action, it should appear that the appearance of imminent danger was such as to convince a reasonable person of the imminence of such danger; and that plaintiff jumped from the car to save himself, as *any reasonable person* might have done under such circumstances. We are not disposed to question the view that such a count states a good cause of action in favor of a *passenger* against his carrier. We assume, however, that even in that case there must be actual negligence in the management of the carrier's cars, and actual danger to the passenger in the situation produced, though it may not be actually *imminent*; or else there must be a willful attempt by the carrier's servant to frighten the passenger—*itself*, of course, a breach of the specific duty owed him. But, however that may be, that case is clearly not applicable here.

The construction and use of side tracks and spurs at convenient places is but an ordinary incident to the use and operation of railroads. They are not, in themselves, dangerous, and add nothing to the perils of service on the main line, except as they may be negligently left open at improper times. And so their use for the purpose here complained of is both customary and proper, and did not endanger the safety of any train or any person passing over the main line. It does not

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appear that this spur was not ordinarily visible to an engineer approaching it on the main line, nor that the position of an engine standing on the spur would not be plainly marked to him by its supporting rails branching from the main line. We are unable to see that its structure and proper use was in any sense a menace to the employees of either company; nor can we predicate thereon a duty to warn employees of the existence of something which defendant might reasonably assume could and would be perceived and understood by them in the ordinary course of their service. So of the position of the engine on the spur. If it was stationed at a safe distance from the main line, there was no breach of defendant's duty in that respect; and certainly no breach of duty in keeping the headlight burning, if, indeed, that was not itself a positive duty, under the circumstances.

It may be conceded that plaintiff's leap to escape from the flaming face of a mogul engine, thus unexpectedly seen in the night, might be no more nor less than what a reasonable man might have done, had he supposed it to be standing on the main line. Nevertheless, we think his case must fail, because the defendant was not guilty of any breach of duty to him, and because he must be held to have assumed the responsibility of determining for himself what he would do for his own safety, when he misjudged ordinary and usual conditions, which were not at all dangerous in fact.

Reduced to its last analysis, the complaint would impose upon defendant the duty of informing plaintiff, not of danger, but of the *absence of danger*—a rule of conduct not prescribed by any authority known to us, and which, we think, cannot be supported by either reason or the requirements of sound policy.

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We have considered the case as if the defendant owed to the employees of the licensee company the same duty it owed to its own employees, which, however, we do not decide, and in the light of the averments of those counts which state the case most strongly and favorably for the plaintiff; and our conclusion is that they show no right of action. The judgment of the circuit court sustaining the demurrer must therefore be affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

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Injury to Person on Track.

(Decided December 17, 1912. 61 South. 77.)

1. *Railroads; Persons on Track; Injury; Complaint; Wantonness.*—A complaint which alleges generally that the servants of a railroad company wantonly or intentionally ran an engine over plaintiff's intestate, sufficiently charges a wanton killing.

2. *Same.*—An averment in a complaint that the servants of defendant wantonly propelled the engine which ran down and killed plaintiff's intestate while crossing the track, at a high rate of speed, without any signal of its approach along the street where people in great numbers crossed and recrossed the track, and that as a proximate result of these acts, intestate was killed, sufficiently charges a wanton killing.

3. *Same; Knowledge of Danger.*—Where the servants of defendant had operated a switch engine for more than a month at the point where intestate was killed, they were charged with knowledge of the conditions there, and that a great number of people constantly passed and repassed along or across the track.

4. *Same; Instructions.*—A charge asserting that if the servants of defendant railroad company in charge of a switch engine backed the same at a high rate of speed along the street without light or signals, and it was known to such servants that people crossed the tracks in large numbers, then their conduct was wanton, and defendant is liable, regardless of whether intestate stops to look and listen, was an invasion of the province of the jury.

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5. *Same*.—A charge asserting that if the agent in charge of the engine was guilty of wanton negligence, then the failure of intestate to stop, look and listen would not defeat a recovery, and that the running of the train at a high rate of speed in a populous district without signals, where the public are expected to pass and repass with frequency, creates an imputation of reckless negligence was not erroneously given.

APPEAL from Colbert Circuit Court.

Heard before Hon. C. P. ALMON.

Action by John F. Hyde as administrator against the Southern Railway Company, for damages for the death of his intestate. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 2 is as follows: "The plaintiff, John F. Hyde, as administrator of the estate of Robert Hyde, deceased, claims of defendant, Southern Railway Company, a corporation, the further sum of \$25,000 as damages for that on and prior to the 18th day of July, 1907, the defendant owned and operated a railroad from Memphis, Tenn., to Stevenson, Ala., over and upon which defendant ran engines and cars propelled by steam, for the transportation of freight and passengers for hire, and that said railroad was laid upon, and ran through, a public street in the city of Tuscumbia, a station on defendant's railroad, and defendant's agents, while engaged in running an engine upon and over said railroad in the corporate limits of said city of Tuscumbia, and in the conduct of the business of the defendant, then and there wantonly or intentionally ran said engine upon plaintiff's intestate, thereby causing his death." Count 4 states the same facts as count 2, with the averment that "on said 16th day of July, 1907, the agents and servants of defendant in charge of an engine, and in conducting the business of defendant, wantonly propelled said engine on the track of defendant on and along a public street in the corporate limits of the city of Tuscumbia, at a

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time when and place where people were wont to cross and recross said street in great numbers and frequency, and said engine was then and there by said agents and servants wantonly run backward at a high rate of speed, and in the nighttime, with no light on the rear end thereof, and without giving any signals of approach, and ran said engine at said time and place upon plaintiff's intestate, who was attempting to cross said street, and then and there crushed and killed him." It is then averred that those in charge of the engine knew, at the time they propelled the same along said street of the city of Tusculumbia, that people then and there crossed and recrossed said street in great numbers and with frequency, and that injury would probably result to some of said people so crossing and recrossing said street, and yet with reckless indifference they propelled an engine backwards along said street at a high rate of speed, without any light on the rear part thereof, and without giving any signals of approach, and that as a proximate result thereof, plaintiff's intestate was killed. Charge 1 seems to have been given for the plaintiff, and is as follows: "If the jury believe from the evidence that Huddleston and Burns, the persons alleged to have been in charge of the engine that killed Robert Hyde, had been for a month or more prior to the night of the 16th of July, 1907, operating a switch engine on Fifth street, between Water and Main, then I charge you that you would be authorized to infer and find that said Huddleston and Burns knew of the conditions prevailing on said Fifth street between Water and Main, at the time Robert Hyde was killed, with respect to the number of people who crossed and recrossed said street at the place of the alleged accident, and the frequency with which they crossed and recrossed." Charge 2: "If the jury believe from the evidence that on the night of

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July 16, 1907, the defendant's agents and servants in charge of the engine backed the same at a high rate of speed, without any light on the forward engine, and without giving any signals of approach on and along Fifth street in the city of Tusculumbia, and that plaintiff's intestate was killed by said engine in attempting to cross said street and that at the time and place said intestate was attempting to make said crossing people crossed and recrossed said street in great numbers and frequency, and that this was known to the persons in charge of said engine, and that they were conscious that in driving said engine at said high rate of speed, without light and without giving signals, injury would probably result to some person exposed to danger on said track, then I charge you that such conduct on the part of said agents and servants of defendant was wanton, and your verdict must be for the plaintiff, although you should further believe from the evidence that Robert Hyde went on said track without stopping to look or listen, although you might believe that he knew of the approach of the engine." Charge 3: "I charge you that if you believe from the evidence that the parties in charge of the engine were guilty of wanton negligence, then I charge you that Hyde's failure to stop, look, and listen, or other negligence on the part of Hyde, would not defeat a recovery in this case. Gentlemen of the jury, to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, in a populous district of an incorporated city, or where the public are expected to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of

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maintaining great speed without warning as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured." The defense was contributory negligence in failing to stop, look, and listen for approaching trains before going on the track, and that the intestate knew that an engine was approaching, and negligently went on the track in such close proximity thereto that he was injured, and that he saw an engine approaching, and, misjudging its speed, or his ability to cross before it reached him, made an attempt to cross, and was killed, and that he was standing on the track when killed. There was evidence tending to support counts 2 and 4, as well as evidence tending to rebut as to the speed of the train, and the want of signals, and also evidence tending to support the pleas.

ALMON & ANDREWS, for appellant. The complaint, especially count 4, was subject to the demurrers interposed.—*Glass v. R. R. Co.*, 94 Ala. 581; *L. & N. v. Richards*, 100 Ala. 366; *Same v. Bowen*, 121 Ala. 221. If the complaint had shown just what the testimony showed, it would be held that the facts alleged do not constitute wanton negligence, and consequently, defendant is entitled to the affirmative charge.—4 Mayf. 302. Counsel discuss the charges refused in the light of the evidence and the complaint, and insist that they should have been given.—*Harris v. Bell*, 27 Ala. 520; *Poole v. Deevers*, 30 Ala. 672; *Stoddard v. Kelly*, 50 Ala. 452; 4 Pac. 858; 32 N. E. 955; 46 Am. St. Rep. 818.

JAMES H. BRANCH, and GEORGE P. JONES, for appellee. No brief reached the Reporter.

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DOWDELL, C. J.—This action is brought under section 2486 of the Code of 1907. The complaint alleges plaintiff's intestate was killed by being run against by a locomotive, in charge of defendant's servants or agents, in a public street of the city of Tusculumbia. Count 2 of the complaint sufficiently charged the wanton killing of plaintiff's intestate.—*Central of Ga. R. R. Co. v. Foshee*, 125 Ala. 226, 27 South. 1006; *A. G. S. R. R. Co. v. Burgess*, 116 Ala. 514, 22 South. 913.

Count 4 conforms to the rule laid down in *L. & N. R. R. Co. v. Orr, Adm'r*, 121 Ala. 498, 499, 26 South. 35, and hence must be held sufficient as charging the wanton killing of plaintiff's intestate.

Charge 1 on page 79 of the transcript states the law correctly as applied to the facts of this case, and was properly given by the trial court, at the request of the plaintiff in writing.—*Stringer v. Ala. Min. R. R. Co., et al.*, 99 Ala. 403, 408, 13 South. 75.

Charge 2 on page 79 of the transcript invaded the province of the jury, and should have been refused to the plaintiff. The giving of this charge constitutes reversible error.

No reversible error was committed in the giving of charges 3 and 4, given at the plaintiff's request—page 80 of the transcript.

The general affirmative charge was properly refused to the defendant, upon the whole case and each count thereof.—*Southern Ry. Co. v. Hyde*, 164 Ala. 170, 51 South. 368. There are numerous assignments of error, many of which are not insisted on; others, treated of in brief of appellant, peculiar to this trial should not, and no doubt will not, arise on the next trial of this case. There are others raising questions decided by this court when this cause was here on the former ap-

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peal. We see no good reason for departing from our rulings therein declared. See *So. Ry. Co. v. Hyde*, 164 Ala. 162, South. 368.

For error herein pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, MAYFIELD, and DE GRAFFENRIED, JJ., concur.

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Injury to Person on Track.

(Decided December 8, 1912. Rehearing denied February 6, 1913.
61 South. 79.)

1. *Street Railways; Persons on Track; Complaint.*—A complaint alleging that the agent of defendant street railway company wantonly and willfully ran a car upon plaintiff, charges a direct trespass, and sufficiently alleges a willful and wanton injury.

2. *Pleading; Duplicity.*—A complaint alleging in a single count that the servants of defendant railroad company willfully and wantonly ran a car against plaintiff, knocking him down and injuring him, does not set up two alternative causes of action, as only the injury is complained of, and that is charged as being both willful and wanton.

3. *Appeal and Error; Harmless Error; Pleading.*—Where demurrers were overruled to pleas which set up the same defense as the defense set up in pleas to which demurrers were sustained, the ruling was harmless, if error.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by T. A. Johnson against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint alleges that the corporation defendant was engaged in operating a street railway system pro-

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pelled by electricity, for the transportation of passengers for hire, and that on a certain date, while the plaintiff was lawfully crossing Avenue D in Nineteenth street in Ensley, the defendant acting by and through its servants or agents who were in charge or control of the car so negligently and carelessly conducted themselves in and about the management, control, and operation of the car that the same was propelled upon or against the plaintiff, thereby knocking him down, and inflicting certain injuries on him which were named, and which were caused proximately by reason of the negligence of the defendant, its servants or agents. The second count states the same matter of inducement, and avers that defendant's servants or agents, acting within the line and scope of their employment in charge or control of defendant's said car at said time and place, wantonly and willfully ran or propelled said car upon or against plaintiff, inflicting upon him the wounds and injuries set out in the first count, and plaintiff avers that his said wounds or injuries were the proximate consequences of, and caused by reason of, the wantonness or willfulness of defendant, its servants, or agents. The demurrers were that the facts averred do not constitute wanton or willful injury, and that the count contains two separate and distinct causes of action, and it does not appear that defendant owed plaintiff any duty. The court overruled the demurrers to pleas 2, 6, 7, and 8, and sustained demurrers to pleas 3, 4; and 5. Two and 3 were almost identical. Six is identical with 3, except that it alleges that plaintiff negligently attempted to cross the track without looking, etc.

TILLMAN, BRADLEY & MORROW, and E. L. ALL, for appellant. The court erred in overruling demurrers to the second count of the complaint as amended.—*So. Ry.*

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v. McIntyre, 152 Ala. 225; *Iron C. M. Co. v. Hughes*, 144 Ala. 608; *A. G. S. v. Shahan*, 116 Ala. 302; *L. & N. v. Cofer*, 110 Ala. 491; *S. A. & M. v. Buford*, 106 Ala. 303; *H. A. & B. v. Dusenberry*, 94 Ala. 413; 22 Mo. App. 607. To sustain the charge laid in the count, proof of actual participation on the part of defendant company is essential.—*City D. Co. v. Henry*, 139 Ala. 161; *Freeman v. C. of Ga.*, 154 Ala. 619; *C. of Ga. v. Freeman*, 140 Ala. 581; *So. Ry. v. Yancy*, 141 Ala. 249; *Bir. Southern v. Gunn*, 141 Ala. 372; *Merril v. Sheffield Co.*, 169 Ala. 262. On these authorities the court was in error in sustaining demurrer to defendant's special plea 3.—*C. of Ga. v. Foshee*, 125 Ala. 199; *Anniston E. & G. Co. v. Rosen*, 159 Ala. 203. The court erred also in sustaining demurrers to plea 5.—Authorities supra.

GASTON & PETTUS, for appellee. Count 2 was in all respects sufficient.—*So. Ry. v. Weatherlow*, 153 Ala. 171; *So. Ry. v. Hyde*, 61 South. 77; *Martin's Case*, 177 Ala. 367; *Burgess' Case*, 114 Ala. 587; *L. & N. v. Johnson*, 162 Ala. 665; *Johnson v. B. R. L. & P. Co.*, 149 Ala. 529; *Ala. C. & C. Co. v. Hammond*, 156 Ala. 253; *B. R., L. & P. Co. v. Gonzalez*, 61 South. 80. If there was error in sustaining demurrers to the pleas, it was without injury as they set up the same defense as were set up in the other pleas to which demurrer was overruled.—*Booth v. Dexter*, 118 Ala. 269; *Montgomery v. Chandler*, 144 Ala. 310; *Berry v. Dozier*, 161 Ala. 309.

MAYFIELD, J.—Count 2 of the complaint was a good and sufficient count to charge wantonness or willfulness under the repeated rulings of this court. The count does not attempt to set out the particular acts, nor the omissions of the particular acts, which constitute the wantonness or the willfulness, but it alleges in

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terms the fact that the agents of the defendant "wantonly and willfully ran a car upon and against the plaintiff," thus alleging a direct trespass by the agents. There is no contention that other parts of the count sufficiently showed that the defendant corporation was liable in damages for the wanton and willful act complained of. It has been repeatedly held by this court that counts claiming damages for wanton or willful acts are sufficient when they allege that the injury was wantonly or willfully inflicted by running a train, car, or engine against plaintiff, and it is not essential that they set out the evidence necessary to show that the given act was wanton or willful. It has been held that counts may allege that the injury was wantonly or willfully inflicted. In this case the allegation was that it was wantonly and willfully inflicted.—*Southern Railway Co. v. Weatherlow*, 153 Ala. 171, 44 South. 1019; *Martin's Case*, 117 Ala. 367, 23 South. 231; *Burgess' Case*, 114 Ala. 587, 22 South. 169; *Southern Railway Co. v. Hyde*, *infra*, 61 South. 77.

The count does not attempt to allege two causes of action in the alternative or disjunctive, as is contended by appellant. It attempts to set up only one cause of action, and alleges that the injury complained of was wantonly and willfully inflicted. Only one act is complained of—running a car over or against plaintiff. The complaint merely alleges that this was done wantonly and willfully, and that plaintiff's injuries were proximately caused by reason of this wanton or willful act.

Whether the court erred in sustaining demurrers to the defendant's pleas 3 and 4, in so far as they were intended as answers to the counts claiming on simple negligence, we need not decide, because demurrers were overruled to other pleas which set up the same defense.

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Plea 3 alleges in express terms that the negligence of plaintiff proximately contributed to his own injury, the injury complained of, in that he attempted to cross the defendant's railroad track on which the car that struck him was approaching, and in dangerous proximity to him, and made such attempt without looking for cars which might be approaching such place on such track, and that he received his alleged injuries while making such attempt. The fourth plea is the same as the third, except that it alleges that the plaintiff so attempted to cross the track without listening for cars which might be approaching. It affirmatively appears from this record that, if error, it was without injury, for the reason that demurrers were overruled to other pleas which set up the same identical defense attempted to be set up by these pleas. The only difference is that the adverb "negligently" was used before the verb "attempt." So, if the defendant could prove one of these pleas, he could prove the others, and if he could not prove the one as to which the demurrer was overruled, he was not entitled to a verdict, for the act complained of must of necessity be negligent, else there is no defense.

The other pleas were subject to the demurrers interposed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

[Sheffield Co. v. Harris.]

Sheffield Co. v. Harris.*Crossing Accident.*

(Decided December 18, 1912. Rehearing denied February 12, 1913.
61 South. 88.)

1. *Street Railways; Collision; Negligence; Evidence.*—The evidence examined and held to support a finding that the motorman operating the car which struck the child was guilty of simple negligence.

2. *Same; Wantonness.*—The evidence examined and held to support a finding that the motorman operating the car which struck the child was guilty of such reckless indifference to probable consequences as to amount to wantonness.

3. *Same; Evidence.*—Where the complaint charged wantonness in the operation of the car, evidence that the street at the point where the accident occurred was in a populous section, and was much travelled, was admissible, as bearing on the question of wanton injury resulting from the operation of the car at a dangerous speed.

4. *Same; Care Required.*—The motorman operating a car on its track so laid as to form a part of the street, must maintain constant watchfulness for those who are in dangerous proximity to the track in using or crossing the street, and must keep his car under such control that it may be stopped before causing injury to a person who is on or dangerously near the track.

5. *Same.*—A motorman operating a car on a track laid in the street cannot assume that a child of tender years on or in dangerous proximity to the track will leave it, and when he sees such a child in such a condition or position, it becomes his duty at once to put his car under such control as to enable him to immediately stop it if necessary to avert injury.

6. *Same.*—Since the rate of speed with which a car may be with safety operated at a given point on a street, may at another time amount to such reckless indifference to the rights of others as to amount to wantonness, under the evidence in this case it was a question for the jury to say whether plaintiff was entitled to a verdict under the 4th count.

7. *Same; Instructions.*—Where complaint alleged wanton negligence a charge asserting that plaintiff did not contend that the motorman intentionally injured him, in effect informed the jury that the plaintiff abandoned the claim that the injuries had been intentionally inflicted and only claimed that they were due to such recklessness as amounted to wantonness, and hence, such instruction was favorable to appellant.

8. *Same.*—Where the evidence tended to show that the motorman saw the child approaching the track, and did not apply the air because the child had a chance to cross the track, or he thought that

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the child might stop before getting on to the track, and that when he attempted to stop the car he was unable to do so in time to prevent the accident, a charge asserting that if the child was on the track or in dangerous proximity thereto, and his acts indicated a purpose to cross the track, and the motorman saw him, and purposely failed to use the means at hand to prevent the injury, which means, if used, would have prevented the injury, there was wanton negligence, was not erroneous for leaving out the essential element of consciousness on the part of the motorman that his failure to use the means would probably cause injury.

9. *Negligence; Contributory Negligence; Children.*—A child five years of age is not chargeable with contributory negligence.

10. *Pleading; Obvious Defect; Self Correcting.*—Where the complaint used the word "defendant" where it was plainly intended to use the word "plaintiff" the defect is self correcting.

11. *Charge of Court; Statement of Conceded Facts.*—Where it was conceded that a child was struck by a car while being operated by the servants of the street car company, and while they were acting within the line of their employment, and the only issue was whether the injuries were due to unavoidable accident, or to the wanton or simple negligence of the servant, it was not erroneous to charge that it was admitted that the child was injured by the servants of the street car company, as such was a mere statement of a conceded fact.

12. *Same; Construction.*—Instructions will be construed as a whole, and when it can be fairly done, every statement on any given subject should be construed in connection with other statements on the subject, and if when so construed the law is correctly stated, the charge will be held free from error.

13. *Trial; Exceptions; Good in Part.*—Where a charge is in part good and in part bad, an exception to it as a whole is not availing to present the exception to the part which is bad.

14. *Damages; Personal Injury; Measure.*—The law has no fixed monetary measure for the assessment of damages for personal injury; they must be fixed by the jury in the exercise of their sound judgment in view of the circumstances of the case, subject to review under certain conditions.

15. *Same; Instructions.*—Where there was no dispute as to the fact and extent of the injuries, and the complaint charged both simple and wanton negligence, a charge that if plaintiff was entitled to recover, he was entitled to compensatory damages, and that the jury might add punitive damages as might be deemed reasonable from the evidence as a punishment for the injury, and that in making the estimate the jury should consider the injuries in the light of their experience and award such compensation as their sound discretion deemed fair considering the circumstances, properly limited the damages, and was not error.

(Anderson, Mayfield and Sayre, JJ., dissent in part.)

APPEAL from Colbert Circuit Court.

Heard before Hon. C. P. ALMON.

[Sheffield Co. v. Harris.]

Action by Bryant Harris, pro ami, against the Sheffield Company for damages for personal injury, caused by a collision. Judgment for plaintiff and defendant appeals. Affirmed.

ALMON, ANDREWS & PEACH, for appellant. The court erred in overruling demurrers to counts 1 and 4, and in refusing to give the general charge.—*Rogers v. Brooks*, 99 Ala. 31; *Patrick v. deBardelaben*, 90 Ala. 13; *Pulliam v. Schimpf*, 109 Ala. 182. In this connection, counsel cite the following cases from other jurisdictions as bearing upon the questions presented both on the pleading and the charges.—14 Ky. Law 425; 37 La. Ann. 288; 18 South. 703; 36 Mo. 384; 71 Mo. 276; 34 N. Y. Supp. 867; 3 Ohio 22; 25 Atl. 606; 18 Ohio St. 255; 49 Am. St. Rep. 400; 56 Ind. 396; 34 Atl. 34 Atl. 119. The court erred in refusing to give charges 18, 38 and 26.—*R. R. Co. v. Schauffler*, 75 Ala. 176; *R. R. Co. Jacobs*, 92 Ala. 187; *Same v. Winn*, 93 Ala. 306; *Lee v. DeBardelaben*, 102 Ala. 628. The court also erred in refusing charges 20, 23, 24, 42 and 44 requested by defendant.—14 Gray 69; 76 N. Y. 530; 89 N. Y. Supp. 968. Charges 27-8 should have been given.—3 N. Y. Supp. 418. Charges 50, 29 and 56, 57 and 59 should have been given.—55 Ill. 367; 49 Am. St. Rep. 400; 175 Pa. 539; *Schneider v. Mobile L. & R. R. Co.*, 146 Ala. 348. Charges 64-5 and 68 should have been given.—*Wes. Ry. v. Mutch*, 97 Ala. *Creola L. Co. v. Mills*, 149 Ala. 474; 149 Ala. 613; 146 Ala. 285, 404; 36 Cyc. 1523 and case cited in notes 77-8. Charge 70 should have been given.—*L. & N. v. Brown*, 121 Ala. 222; *M. & C. v. Martin*, 117 Ala. 367. Counsel discuss the other assignments of error in the light of the above authorities, and insist that prejudicial error intervened.

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JOSEPH N. NATHAN, and KIRK, CARMICHAEL & RATHER, for appellee. No brief reached the Reporter.

DE GRAFFENRIED, J.—The plaintiff, Bryant Harris, was on March 28, 1909, struck by one of the Sheffield Company's street cars and suffered the loss of both of his feet. When the plaintiff received his injuries he was only five years of age, and the law, on account of his age, does not apply the doctrine of contributory negligence to him.

The plaintiff received his injuries in the town of Sheffield, at or near the point in said town where Atlanta avenue, which is 80 feet wide, crosses D street. Atlanta avenue runs north and south, and D street runs east and west. The defendant, the Sheffield Company, owns and operates a street car line on said avenue. The track is imbedded in the street and forms a part of it. The Baptist Church is situated on the corner immediately west of said avenue and immediately south of D street. Atlanta avenue is straight, and for several hundred feet north and south of the point where the Baptist Church stands the view up and down the street is unobstructed from sidewalk to sidewalk. From a point several hundred feet north of the said church on said Atlanta avenue to the point where the plaintiff received his injuries, it is slightly downgrade, and the evidence is in dispute as to whether the car which struck the plaintiff was traveling slowly, at a moderate, or at a rapid rate of speed when the plaintiff was struck.

The motorman testified that the car was, at the time the child was struck, in perfect running and working order, and that he used all means known to a skillful motorman to stop the car when he first discovered the presence of the child on the street car track, and the evidence shows, we think, with reasonable certainty,

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that the car was not stopped until after it had passed the point of the plaintiff's injuries about 80 feet.

It appears that the plaintiff, along with other children, had attended Sunday School that morning—the injuries were received by the plaintiff on Sunday morning—and that the two Sunday School classes which were composed of children of tender age, to one of which the plaintiff belonged, had just been dismissed ahead of the other children; that they had left the church; that some of them were standing on the sidewalk and in the street near the sidewalk next to the church; that some of them had crossed the street; and that the plaintiff had either gone partly across the street and then turned back and was going back towards the church when he was struck, or he had walked out to the east rail of the defendant's track and then turned back towards the church; but was struck before he could get off the track.

The defendant insists that the child had crossed the track several feet and walked east and away from the track, when he suddenly wheeled and ran in front of the car; that the injuries were unavoidable; and that the danger could not have been reasonably anticipated. There was evidence, however, on the part of the plaintiff, that the child left the sidewalk in front of the church and proceeded in the direction of the defendant's track, and that he never did get beyond the east rail of the track before he turned and started back towards the church.

However this may be, the child received his injuries while on the defendant's track, and the motorman, in whose plain view these children of tender years were for 400 or 500 feet before he reached the point where they were on the street, testified, "I could see that there were a number of children all along there." These chil-

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dren, as we have already said, composed the two junior classes of the Baptist Sunday School; children who, on account of their tender age, were dismissed ahead of the rest of the school, and there is nothing in the evidence tending to show that they or any of them were attended by a nurse or other person of discretion.

As the motorman "could see that there were a number of children all along there" for a distance of several hundred feet before he reached them, he could, also, probably have seen that their sizes indicated helplessness and heedlessness, and that, in passing them, even ordinary prudence would require the exercise of great caution. The evidence of the motorman tends to show that he saw the plaintiff when he left the sidewalk in front of the church and started east across Atlanta avenue, and it also tends to show that the car was then traveling at from eight to ten miles per hour. While the motorman's testimony tended to show that the car was in good working order and that he used all the means known to a skillful motorman to stop the car when he discovered the plaintiff's peril and that he did stop the car as quickly as it could be stopped, there was other evidence in the case tending to show that a properly equipped car, at the point where the injury occurred, operated under the conditions prevailing as they were described as existing at that time by the motorman, running at a speed not greater than six miles per hour, could, by a skillful motorman, have been stopped instantly, and if traveling at a rate of speed ranging from eight to fifteen miles per hour that it could, by a skillful motorman, have been stopped within about 25 feet.

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As this car, on the occasion named, ran about 80 feet after the child was struck, and as the motorman claims that he, even before he struck the child, did all that could have been done by a skillful motorman to stop the car, and as he claims to have actually stopped the car as quickly as it could be stopped, it was, we think, under all the circumstances as shown by the evidence, for the jury to say whether, upon the named occasion, the motorman was guilty not only of simple neglect, but, in the matter of the speed at which he permitted the car to travel to the place occupied by the plaintiff and his companions near the church, of that reckless indifference to probable consequences as amounted to wantonness. The motorman admits that he saw the plaintiff when—as he claims—he crossed the track; but he admits that after that time he lost sight of the child until after it had turned around and had started back in the direction of the track and was in dangerous proximity to it. He gives an explanation of why he lost sight of the plaintiff; but the jury may not have believed his explanation, or, if they did, may not have accepted it as furnishing a reasonable excuse for such failure.

A motorman in charge of a street car running upon a track which is imbedded in and forms a part of the street is charged, by the law, at all times, whether his car is in a street which is frequently or one which is seldom used by the public, with *constant watchfulness* for those who, in using or crossing the street, go upon or in dangerous proximity to the track. He is also required to operate his car under such speed and with such control that, if “persons or property be upon or dangerously near the track of the street railway, the car may be, with skilled application of stopping appliances, stopped, and injury thereby averted.”—*Anniston*

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El. & G. Co. v. Rosen, 159 Ala. 202, 48 South. 801, 133 Am. St. Rep. 32.

The motorman of a street car has no right to assume that a child of tender age—such a child as the plaintiff in this case was—who is seen by him on, or in dangerous proximity to, the track, will leave the track to avert injury. When he sees such a child, or children, on or in dangerous proximity to the track, the law requires him to *at once* put his car under *such control* as to immediately stop it, if that becomes necessary to avert injury.—*Anniston El. & G. Co. v. Rosen*, 159 Ala. 195, 48 South. 798, 133 Am. St. Rep. 32.

It is also a familiar proposition that a rate of speed which a street car may, with perfect safety, maintain at a given point on a street at one time, may, at another time, amount to that reckless indifference to the rights of others as to amount to wantonness.

Under some of the tendencies of the plaintiff's evidence he was, if the jury believed that evidence, entitled to a verdict upon the first count of the complaint, and, under other phases of the evidence, it was for the jury to say whether he was entitled to a verdict under the fourth count.—*Nellis on Street Railways*, vol. 2, p. 347; *Rosen's Case*, *supra*; *Joyce on Electric Law*, §§ 570, 573, 582.

(1) The original complaint consisted of four counts, but the second and third were eliminated, and the case was tried upon the first count, which was a count for simple negligence, and the fourth count, which alleged that the plaintiff's injuries were willfully or wantonly inflicted. Both of these counts alleged that the plaintiff was only five years old when he received his injuries. As therefore it is plain that the plea of contributory negligence was applicable to neither count,

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the action of the trial court in striking that plea as frivolous was free from error.

(2) In both the first and fourth counts the word "defendant" was used where the word "plaintiff" was plainly intended, and that defect was therefore self-correcting. There was a demurrer to these counts, but the demurrer was not well taken. The sufficiency of similar counts, when tested by demurrer, has been so frequently upheld by this court that we deem a citation of authority to sustain this statement as altogether unnecessary.

(3) The trial court gave its instructions to the jury in writing, and numerous exceptions were reserved by the defendant to certain parts of the charge. It is unnecessary to consider all of these exceptions, and we will pass upon only those which appear to have some merit, and which therefore deserve discussion.

(a) The first exception is to that part of the court's oral charge which says, "It is admitted that the plaintiff was injured by the agents and servants of the defendant in charge of one of defendant's cars," etc. The plaintiff was, confessedly, struck by one of the defendant's cars while the same was being operated by its servants and while the servants were acting in the line of their employment. The question in this case was not whether the plaintiff was injured by the defendant's agents or servants while acting in the line of their employment, but whether his injuries were due to unavoidable accident or to the negligence—simple or wanton—of said servants or agents. The above statement of the court was a mere statement of a conceded fact and did not constitute error.—*Stephenson v. Wright*, 111 Ala. 579, 20 South. 622; 2 Mayf. Dig. p. 568, subd. 127.

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(b) Those portions of the oral charge numbered 19 and 6 made the basis of assignments of error Nos. 40 and 32 were (when read in connection with the rest of the charge, of which they formed a part), as applied to the evidence in this case, correct statements of the law. —*Rosen's Case, supra.* There runs through the entire charge of the court on the subject of simple negligence this statement of the court to the jury, viz: "It is the duty of a motorman, in charge of a car, to exercise *ordinary care* in the management of the same, so as to avoid, so far as he *reasonably* can, injury to persons using the street for the purpose of travel." And we think that this statement of the court should be read in connection with the above portions of the oral charge of the court to which exceptions were taken, and that, when so read, the portions excepted to are free from error. The charge of the court to a jury must be construed as a whole, and every statement upon any given subject in the charge should, when that can fairly be done, be construed in connection with the other statements of the court upon that subject, and if, when so construed, the law on the subject is fairly and correctly stated, then such statement of the law is free from error.

(c) The fourth count charges that the plaintiff's damages were suffered by him by reason of the "wanton negligence or willful injury" of defendant's servants or agents, etc. The court instructed the jury that the plaintiff did not contend that the defendant's servants or agents "intentionally injured" the plaintiff. When this instruction was given, the evidence was all before the jury, the arguments of counsel had been made, and the court, in effect, told the jury that the plaintiff had abandoned his claim that his injuries had been intentionally inflicted, and only claimed that they were due, at best, to an act of recklessness amounting to wanton-

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ness. This portion of the charge was certainly favorable to the defendant, and as to it the defendant has no right to complain.

(d) The following other portion of the court's charge was excepted to, and is here vigorously pressed as having been erroneous: "If you find for the plaintiff on the fourth count of the complaint, the damages that he is entitled to recover are compensatory, as I have heretofore defined compensatory damages to you. To this you may add punitive or exemplary damages; that is, such damages as you may think reasonable and right in this case from the testimony as a punishment to the defendant for the plaintiff's injury. And in making your estimate of the damages you should consider plaintiff's injuries in the light of your experience and award him such compensation as in your sound discretion, dispassionately considering all the circumstances, you deem fair."

We have, for our convenience, divided the above excerpt from the charge into three sentences, although, as it appears in the transcript, the whole excerpt is in one sentence. We do not think that the above excerpt, even if it be conceded to be technically faulty in some minor particulars (and to these we shall later refer) is, when given a fair interpretation (such an interpretation as an intelligent jury would be expected to give it), as applied to the evidence in this particular case, an incorrect statement of the law. We think that the word "discretion," as it appears in the third sentence of the above excerpt, was used by the court, and understood by the jury, as synonymous with the word "judgment," and that the words "under all the circumstances," appearing in the third sentence, really, as the facts in this record appear, were entitled to be receiv-

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ed by the jury, and were actually interpreted by them, as meaning "under all the evidence."

Elliptical forms of expression are not uncommon, and they rarely mislead. In this case the law was powerless to furnish to the jury a perfect standard by which to measure the plaintiff's damages. Both of his feet were gone. He had been deformed and rendered a helpless cripple for the balance of his life. He had suffered, and he was only five years old. His damages were confessedly great, but the law has no fixed monetary standard by which human suffering can be measured, neither has it a fixed value for both of the feet of a human being. "The damages," says the Supreme Court of the United States, "in these cases, must depend very much upon the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case."—*Railroad Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591. "The law does not attempt to fix any precise value for the admeasurement of such damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury."—*Aldrich v. Palmer*, 24 Cal. 513.

In this case there was no dispute as to the fact and extent of the plaintiff's injuries, and as the law can have "no fixed measure of compensation for the pain and anguish of body and mind, or the permanent injury to health or body" (Sedgwick on Damages, vol. 2, § 481, and authorities cited), we are of the opinion that, when the above excerpt is given a fair interpretation and is considered in connection with the evidence, the conclusion is irresistible that it simply meant that the jury, in determining the amount of the plaintiff's compensatory damages, should fix an amount which, in their dispassionate judgment, under all the facts and circumstances, would compensate the plaintiff for the loss

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which he had sustained, and that, if the jury were of the opinion, after considering all the evidence, that the plaintiff's injuries were due to the wanton negligence of the defendant's servants, then that they might, if they saw proper so to do, add such reasonable sum as in their judgment would sufficiently punish the defendant.

For these reasons, we are of opinion that the above excerpt from the charge of the court is free from error.

In addition to the above, we direct attention to the fact that the excerpt now under consideration was excepted to by the defendant as a whole. The first part of the excerpt—that part contained in the first two sentences—is, we think, not only a clear statement of the law, but is not subject to the hypercriticism of a skilled dialectician, and the proposition is familiar that, when an exception is taken to a charge of a court on a given subject as a whole and the charge so excepted to is good in part and bad in part, the exception fails.

(4) Many exceptions were reserved to the action of the trial court in permitting evidence to go to the jury tending to show that Atlanta avenue, at the point where the injury occurred, was in a populous section and was, at that point, a much traveled thoroughfare. That rate of speed which, in a sparsely settled neighborhood of a town and upon an infrequently used street in such neighborhood, would be a reasonable rate of speed, in a thickly settled neighborhood and upon a much used street, might amount to a reckless and dangerous rate of speed, and upon the question of wanton injury we think the above testimony was certainly admissible and relevant.

(5) This case has received a careful consideration at the hands of each member of this court, and we have above alluded to every question presented by this rec-

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ord which, in the opinion of any member of this court, deserves consideration. There seems to have been a fair and impartial trial of this case in the court below. The jury, under the disputed issues of fact, returned a verdict in favor of the plaintiff for \$10,000. There was a judgment following the verdict, and, as we find no error in the record, we are of the opinion that the judgment of the court below should be affirmed.

Affirmed.

MAYFIELD, J., is of the opinion that the trial court committed reversible error in that part of its oral charge to the jury quoted by us in subdivision "a" of section 3 of the above opinion, in that said quoted portion was, in fact, a charge upon the effect of the evidence.

MAYFIELD and SAYRE, JJ., are of the opinion that the trial court placed too high a degree of care upon the motorman in those portions of its oral charge made the basis of assignments of error 40 and 32 and referred to by us in subdivision "b" of section 3 of the above opinion, and for that reason committed reversible error.

ANDERSON and MAYFIELD, JJ., are of the opinion that the trial court committed reversible error in that portion of the oral charge of the court quoted by us in subdivision "d" of section 3 of the above opinion, in that the trial court, in said portions of the oral charge, erroneously stated the manner in which the plaintiff's damages should be estimated.

ON APPLICATION FOR REHEARING.

DE GRAFFENRIED, J.—The above opinion shows on its face that this case has received, at the hands of each member of this court, the utmost consideration.

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The opinion was written *after* the case had been fully considered by the whole court and the legal questions which the court felt deserved discussion had been fully determined by the court.

(1) When an opinion is handed down by an appellate court, it should, so far as possible, be so worded that no doubt can be entertained as to the meaning of the court. It should, if possible, be so expressed as that he "who runs may read." General statements of undisputed facts are frequently indulged in, not for the information of the parties who already *know* the facts, but for the information of the stranger to the cause in order that he, upon reading the opinion, may be clearly informed as to what the court did in fact decide. Counsel for appellant, in briefs filed by them on this application for a rehearing, call attention to certain immaterial inaccuracies in the general statement of the facts contained in the above opinion as to the width of a street, points of the compass, etc. (these inaccuracies have been corrected to meet the exactitude desired by counsel); but those general statements had nothing to do with the law of this particular case. It does not matter, so far as the material facts of this case are concerned, whether the street on which the child received his injuries was 80 or 85 feet wide, or whether the street car line was east or south of the church.

(2) That which is law as applied to the facts of one case may not be the law as applied to the facts of some other case. In this case it is earnestly insisted that the following portion of the oral charge of the court, viz.: "If you are reasonably satisfied from the evidence in this case that on the 28th day of March, 1909, the plaintiff was on the track or on the side of the track of the defendant and in dangerous proximity thereto on Atlanta avenue in the corporate limits of the city of Shef-

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field, Ala., and that his acts indicated a purpose to cross said track, and defendant's motorman in charge of said car saw him thus on the track or in dangerous proximity thereto, and that the motorman in charge of the car purposely and consciously failed to use the means at hand to prevent the injury, and which means, if taken, would have prevented the injury, then I charge you that this would be wanton negligence on the part of the motorman that would entitle the plaintiff to recover"—is erroneous in that the court left out of said charge the *essential* element of the *consciousness* on the part of the motorman that his "conscious failure to use the means at hand to prevent the injury" *would probably eventuate in injury*. In other words, that for the motorman to have been guilty of wanton injury he must not only have *consciously* failed to use the means at hand to prevent the injury, but that he must, when he did so, have been conscious of the fact that his failure to so use the means at hand would probably result in injury. Undoubtedly as a general proposition the legal principle contended for by appellant is correct.—*Anniston Electric & Gas Company v. Rosen*, 159 Ala. 195, 48 South. 798, 133 Am. St. Rep. 32.

Under the facts of the instant case the trial court cannot, however, be put in error on account of the claimed defect in the charge. The motorman is the servant of the appellant to whose acts the plaintiff's injuries were due, and the motorman testified to the following: "*I did not apply all the air as soon as I saw the child start towards the track. I thought he had a chance to get across, and then I thought he might stop after he started.*" We have adverted to the tender age of the plaintiff; and the heedlessness, trustfulness, and helplessness of children of the tender age of the plaintiff are proverbial. The motorman saw the child and from

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his acts saw that he was proceeding to a place of danger, and, according to his own testimony, instead of taking measures to prevent the injury, *took the chances*. The motorman knew that his car would kill or seriously injure the child if it struck him. He knew that the child was going in the direction of the track, and yet he did not apply *all* the air because he thought the child had a *chance* to get across the track, or thought that he *might stop* before getting upon the track. It seems to us that this admission of the motorman—and he was a witness for the defendant—showed, *as matter of law*, that the motorman, when he consciously failed to “apply all of the air,” did so with the “consciousness that such failure to act on his part would probably eventuate in injury” to the plaintiff. His failure to “apply all of the air,” under the circumstances shown by his admission, amounted to that reckless indifference to the rights of others which the law calls wantonness. If the plaintiff had been a person of discreet age instead of a child of extremely tender years, the motorman’s act might be differently construed.

MAYFIELD, J.—(dissenting).—I cannot concur in the affirmance of this judgment. I think it was a case in which the jury might probably have rendered a verdict against the defendant; but I do not think it was a case under the issues and the evidence, in which the trial court could, as he did in this case, direct a verdict for plaintiff. I think it was a case for the jury to say whether or not either of the issues was proven.

I do not mean to say that the trial court did in form direct the verdict, but it did so, in effect, more than once. If the trial court said to the jury, in its charges, what the record recites it did, the verdict was in effect directed several times. It is very true that the court

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did, in terms and in form, say to the jury that it was a question for the jury and not for the court, and it declined to give the affirmative instruction in form, but, nevertheless, gave it in effect.

I do not mean to intimate that the trial court so intended the effect of its charge, but, on the contrary, that it intended the effect to be what it was in form, and what it ought to have been, to warrant the submission of the disputed questions of fact to the jury for determination.

I also know that my Brothers have the same opinion as to the effect of the charge of the trial court, which that court had of it; but I think they err in their judgment, and I shall attempt to state the reason for my dissent.

There were but two issues in this case: First, did the defendant's servants or agents, acting within the line and scope of their employment, negligently run the car over the plaintiff? Second, did they wantonly or willfully run the car over the plaintiff?

There were no pleas of contributory negligence, or of assumption of risk, or any other pleas of confession and avoidance. The issues were thus few, simple, and clear-cut.

There was no dispute in the evidence that a street car of the defendant ran over the plaintiff's feet and legs, and thus maimed him and made a cripple of him for life. The injuries were unquestionably serious and permanent.

The defendant claimed—and its evidence, standing alone, unquestionably established the fact—that the injury was not inflicted by its agents or servants, either negligently, wantonly, or willfully, or in any other mode or manner; but that the injury was the result of an inevitable accident, and was due solely to the un-

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alterable laws of nature; and that its agents and servants, not only did not cause the injury, but that no human power or foresight could, under the circumstances, have prevented the injury.

I concede that the plaintiff had some evidence which made this question, under our practice, one for the jury; yet, if the unerring truth could speak, it would proclaim the catastrophe an unavoidable accident.

The real and only disputed and concrete question was whether the injury was inflicted by the defendant's motorman negligently or willfully, or whether it was an inevitable and unavoidable accident.

If the evidence of the motorman was true—and he had the best opportunity of knowing the facts—the injury, accident, and result was unavoidable; no human agency in control of the car could have prevented the result. He denies emphatically that he or any other agent or servant inflicted the injury.

Notwithstanding these issues and this evidence, the trial court, among other things, charged the jury as follows: "It is admitted that the plaintiff was injured by the agents and servants of defendant." If so, then this was an end of this case, except as to the question whether the injury was negligently, wantonly, or willfully inflicted, and the question of the amount of the damages. This charge, in effect, directed a verdict for plaintiff. The formal affirmative charge, with the usual hypothesis, would not be as effective to produce a verdict for the plaintiff as this charge; for the reason that the formal charge requires that the jury must "believe the evidence," while the charge given says in effect that it is admitted that the plaintiff is entitled to recover, and that the only question for the jury to determine is whether the wrong was done negligently or wantonly, together with the question of the amount of damages.

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That the jury so understood this charge is made clear to my mind by what was shown on the application for a new trial. It was there made to appear that the only question which troubled the jury was whether they could find for the plaintiff on one count only, or whether they should find for him under both, or whether they had to say, by their verdict, on which count they found for the plaintiff.

To test the effect of this charge, suppose the defendant had filed only one plea, and that plea had followed the charge as far as practical; what would have been the legal effect of the plea? The plaintiff would have been entitled to a judgment by confession upon this plea. If so, was the charge less effective?

The majority opinion answers this by saying: Yes, but the court in other parts of its charge charged the law correctly, and we will not reverse as for this part of the charge; the other parts explained this part so as to cure it of error. But the reply to this answer is that the statutes of this state expressly authorize a defendant to plead several inconsistent pleas; whereas, there is no statute authorizing the court to give several inconsistent charges.

To show that the majority of my Brothers are wrong in their conclusion, let us suppose that the court had not only charged the law correctly in other parts of the charge, but, immediately after the charge complained of, had directed a verdict for the defendant; and the jury, following the first instruction, had found for the *plaintiff*: Could it be said that the error was without injury, or that it was cured by the last charge in favor of the defendant? Surely not. If this is true, then how can it be said that this charge, or this part of the main charge, or other parts hereinafter complained of, were without injury to the defendant?

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With all due deference to the opinion of my Brothers, if this charge, or this part of the main charge of the court, was not a charge upon the effect of the evidence, in violation of the mandate of the statute, then I confess I am at a loss to know what is necessary to constitute a violation of that statute.

The above is what appears to me to be the effect of the charge as a matter of law. Let us now examine it as a matter of fact. I do not think that it is shown by the record, which purports to contain all the pleadings and all the evidence, that it was admitted that the defendant's agents and servants inflicted the injury complained of. If this be true, then it must be admitted that every injury to a child of very tender years, by a street car's striking it, is caused by the agents or servants of the street car company. I do not believe that this follows either as a matter of fact or matter of law.

Suppose that a child is standing behind a tree, close to an approaching street car, or on a fence or a porch near an approaching car, and that suddenly and without warning he jumps in front of the moving car and is injured by the car's striking him: Can it be truthfully said that the motorman or the conductor inflicted or caused the injuries? I think not. Suppose that a child hides under a trestle or in an open culvert and, as the car is passing over him, protrudes his head in the way of the passing car, and is killed by contact therewith, the agents or servants in charge of the car knowing nothing of his presence, or of the injury: Is it possible that they inflicted or caused the injury?

Now, let me put the exact case presented by this record, according to the person best situated to know the facts, if he spoke the truth; and as to whether he did or did not was certainly a question for the jury. He (the motorman) said: "I was keeping a lookout in

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front of me, to see if there was anything or anybody crossing the street that would be in my way at all. There was not any one in the street at all until I got to Fourth street, and when I got there two little boys were standing on the left of the car track or the east side—I suppose it was about 10 or 12 feet from the track—and then one of the little boys came out from the corner of the church and ran across where the other little boys were. Then I looked away to see about the other children coming out of the church, looking to see if any of them were crossing the track. As I glanced back, the little fellow had started back across the street, right in front of my car, about 6 or 7 feet from the car when I saw him. The children were on the east side of the track, about 10 or 12 feet from the east rail and standing near the corner of Mr. Hyde's residence. The little boy that got hurt came across the track from towards the church. He went to where the two little boys were standing. He went about 10 or 12 feet east of the track before he turned back. My car was then about even with the north sidewalk of Fourth street. I thought the little fellow was safe, and I glanced across to the church to see about the other children coming out of the church. When I looked at him again he was within 6 or 7 feet of the car going in the same direction he came from. He was running as fast as he could. I applied my brakes as soon as I could, and when I saw that was not going to save him I reversed my current; but by the time I could apply my brakes the car had struck him, and the motion of the car carried it over him." Further on, he says: "I would not have hurt that child for anything in this world. I am sure I did everything in my power to stop that car."

Does this evidence justify the court in charging, as it did charge, that it is admitted that the plaintiff was in-

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jured by the agents and servants of the defendant? How can an agency inflict an injury which that agency could not prevent or even anticipate? Is it good English, good logic, good morals or good law, to say that I inflicted an injury because I could not have prevented it? If I own a millpond, or a field, and a child under seven years of age is drowned in that pond, or kills itself by running against a stump in that field, did I cause the death, for no other reason than that I owned or controlled the millpond or the field? Surely not. That is what this charge in legal effect, under the pleading and proof in this case, in my judgment, asserts. In my humble judgment it is wrong in fact, in morals, and in law.

The court, among other things, charged the jury that the motorman "should keep his car so far under proper control as to avoid injury to persons on foot or in vehicles," and, further on, leaving the abstract propositions as to the duty of motorman, and coming to the concrete case, said: "The motorman should have had the means at his command by the exercise of reasonable care and skill to stop the car upon the appearance of danger to the plaintiff."

I submit candidly that if these charges, or parts of the main charge, in the case, state the law, then it is a physical and legal impossibility for street cars to run upon or across the public highways, without being liable in damages for every injury inflicted by the collision of a moving car, with "persons on foot or in vehicles." Of course, I know my Brothers never intended to decide this, and are not conscious of the fact that they have decided; but I submit that a close and careful study of this record, and of the charge of the trial court, such as I have bestowed upon it, will convince the trial

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court and my Brothers that such is the effect of those portions of the oral charge of the court.

The trial court likewise erred to the prejudice of the defendant, in its charge to the jury as to how they should ascertain the amount of compensatory damages which plaintiff might recover. How is it possible for a court to charge a jury in a case like this, and as the majority opinion vividly pictures it, that in fixing the amount of damages they may consult their experience and award such amount as in their discretion they deem fair? Does the amount of compensation to which a plaintiff is entitled for a given injury depend upon the personal experience of the individual jurors awarding it, and does the amount rest in their discretion?

While, of course, the amount is not liquidated and cannot be made certain except by the verdict of the jury, and the jurors are called for the purpose of ascertaining the amount and thus making it certain, liquidating it, yet they must be guided in this matter by the evidence, and not by their experience and discretion. This court has said that it is error to charge the jury that the amount of punitive damages rests solely within the unbridled discretion of the jury; yet punitive damages does rest largely, of necessity, in the discretion of the jury, because it does not at all depend upon the extent or severity of the injury, as does compensatory damages, but is intended only as a punishment and is to be fixed by the jury.

I cannot agree with the majority in holding that the giving of an erroneous charge or instruction to a jury is cured by the court's giving (before or afterwards) a correct charge, whether they both be in the same sentence or in different sentences. How can this court know that the jury did not obey the bad charge and disregard the correct one? The jury cannot obey or regard

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both if they are diametrically opposed, as in this case, one in accordance with the law, and the other opposed thereto. Is there not a strong presumption that they obeyed the bad charge, and disregarded the good one, when they found a verdict as directed by the bad charge?

I make this last statement for the reason that the trial court did, in the main charge, (as to part of which I am complaining), instruct the jury fully and correctly upon all the questions discussed by me; but the court did not stop at this, it repeated and repeated, and in the instances which I have pointed out (and in others, not indicated) it charged the law incorrectly, even to the extent of charging the defendant out of the court and, in effect though not in terms, directing the jury to find a verdict for the plaintiff.

In order to test the correctness and propriety of the rule announced in this case, as to reviewing rulings of trial courts upon exceptions to the main charge—remembering the other rules of construction that enough of the charge must be set out to show the sense and meaning in which the instruction complained of was used, and that the court cannot, in the main charge, instruct upon the effect of the evidence, because the statute prohibits it—suppose the trial court correctly and fully charges the jury upon all phases of the evidence and upon all the issues (as was done in this case), and then concludes his charge in the following sentence: “This is a case in which the jury, and not the court must determine who is entitled to a verdict; but the court charges you that the plaintiff ought to have a verdict and that the defendant, also, is entitled to a verdict.”

Under the rule declared by the majority in this case, no possible exception can be taken to this charge, or part of the main charge, which will work a reversal. If

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the exception is to the whole quoted sentence, the court will say: We can divide that sentence into three, and one or the other will of necessity be correct in every case, or it will be in favor of the party excepting, and of which he complains. If he segregates the part to which he excepts from its context with the other parts of the sentence in which it is used, and therefore shows it to be bad, the appellate court, of course, cannot know whether the part excepted to was good or bad. Its context might show that the part excepted to was perfectly correct and proper.

If the rule applied in this case is to be used in connection with the other rules heretofore announced and applied, as to exceptions to parts of the main charge, then, I submit, it is impracticable, if not impossible, to reverse a trial court as to improper instructions to the jury, where the improper instruction is used in the same connection and in the same sentence with a correct proposition.

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Collision.

(Decided May 1, 1913. Rehearing denied June 19, 1913.
62 South. 816.)

1. *Street Railways; Collision; Instruction.*—Where the action was for injury alleged to have been sustained in a collision between a street car and an automobile in which plaintiff was riding, a charge asserting that if the chauffeur in charge of the automobile of plaintiff was negligent in running the automobile down a hill at the time of the collision, and if this negligence on his part was the sole and proximate cause of the collision and of plaintiff's injury, the verdict should be for defendant, was proper, and its refusal error.

2. *Same; Complaint.*—The complaint examined and held to state a good cause of action as against the grounds of demurrer interposed thereto.

(Mayfield and Sayre, JJ., dissent in part.)

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APPEAL from Birmingham City Court.

Heard before Hon. William M. WALKER.

Action by Beatrice Ely against Birmingham Railway, Light & Power Company, for damages for injury alleged to have been sustained in a collision between a street car of defendant and an automobile in which plaintiff was riding. Judgment for plaintiff and defendant appeals. Reversed and remanded.

TILLMAN, BRADLEY & MORROW, and FRANK M. DOMINICK, for appellant. The demurrers to count 1 of the complaint should have been sustained.—*A. G. S. v. Vail*, 142 Ala. 141; *Weatherly v. N. C. & St. L.*, 166 Ala. 581; *L. & N. v. Marbury L. Co.*, 125 Ala. 237; *B. R., L. & P. Co. v. Jones*, 146 Ala. 277; *Same v. Landrum*, 153 Ala. 201; *Same v. Moore*, 163 Ala. 45; *L. & N. v. Young*, 53 South. 216. Counsel discuss assignments of error relative to evidence, but without citation of authority. The court erred in refusing charge 5 requested by defendant.—*A. G. S. v. Vail, supra*. The court also erred in refusing charge 9.—Authorities *supra*.

HARSH, BEDDOW & FITTS, for appellee. Count 1 was in all respects sufficient.—Sec. 5382, Code 1907; Stephens on Pleading, 41; 2 Chitty 355; 6 Enc. P. & P. 706, 723; *B. R., L. & P. Co. v. Yates*, 169 Ala. 383; *R. & D. R. R. Co. v. Farmer*, 97 Ala. 143. There was no error in permitting the question to Mrs. Ely as to whether her nervousness was increased from the effect of the collision.—*S. & N. R. R. Co. v. McLendon*, 63 Ala. 275; *B. R., L. & P. Co. v. McLain*, 50 South. 149. Charge 9 was properly refused.—6 Mayf. 109; 5 Mayf. 151; *Republic I. & S. Co. v. Williams*, 168 Ala. 619.

MAYFIELD, J.—This action is to recover damages for personal injuries alleged to have been caused by

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a collision between appellant's street car and an automobile in which plaintiff was riding.

The first count of the complaint, omitting style of case and details as to character and extent of the injuries, was in the following language: "The plaintiff claims of the defendant \$10,000 damages, for that, heretofore, to-wit, September 18, 1911, while the plaintiff was in a vehicle, to-wit, an automobile, upon a public street in the city of Birmingham, Ala., a collision occurred between said vehicle and a street car operated by defendant upon said public street, and as a proximate consequence of said collision plaintiff was thrown or caused to fall, was greatly shocked, was mashed, bruised, cut, and otherwise injured in her person. * * * Plaintiff alleges that defendant negligently caused or allowed said collision on the occasion aforesaid and plaintiff's said consequent injuries and damages."

The defendant demurred to this count, assigning, among others, the following special grounds of demurrer:

"(1) For that the averments of said counts are vague, uncertain and indefinite.

"(2) For that it does not appear with sufficient certainty what duty the defendant owed to the plaintiff.

"(3) For that it does not appear therefrom with sufficient certainty wherein or how the defendant violated any duty which it owed to the plaintiff.

"For that sufficient causal connection does not therein appear between defendant's said negligence and plaintiff's alleged injuries.

"For that it does not appear therein with sufficient certainty how or in what manner defendant negligently caused or allowed said collision."

The trial court overruled the demurrer, and this ruling is the first assignment insisted upon as error.

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We are of the opinion that this count was subject to one or more grounds of the demurrer, and that the trial court erred in this ruling. The only negligence, actionable or nonactionable, attempted to be alleged, is that 'defendant negligently caused or allowed said collision on the occasion aforesaid, and plaintiff's said consequent injuries and damage.' The gist of this allegation is that the defendant negligently caused or allowed the collision. The negligence being alleged in the alternative, the count can be no stronger than the weakest alternative—that the defendant negligently allowed its car to collide with the automobile, and likewise allowed plaintiff to be injured. The count must be construed most strongly against the plaintiff, and it is therefore open to the construction that defendant negligently stopped its car on the street crossing, and that plaintiff willfully ran the automobile into the street car; or that defendant negligently stopped the car on the wrong side of the street, and that plaintiff thereafter, without other fault on the part of defendant, negligently or willfully ran the automobile into the street car. In neither event would the defendant be liable. If the count had alleged that the relation of passenger and carrier existed at the time, then it might have been sufficient. It would then have shown a duty owing from the defendant to the plaintiff, and a breach thereof, which proximately caused the injury; but it shows no such relation, and shows no breach of any duty, which proximately caused the injury complained of.

It is true that the count in plain and concise language alleges a collision between an automobile in which plaintiff was riding and a street car operated by the defendant, and injuries to plaintiff in consequence of the collision; but what caused the collision—whether it was an inevitable accident, or the result of some will-

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ful, wanton, or negligent act of the driver of the automobile—does not appear; and hence this necessary allegation must be presumed against the plaintiff. It does not show that defendant's negligence was the proximate cause of the injury. The count does conclude with a mere conclusion of the pleader that the collision was negligently caused or allowed by the defendant. The word "negligently," as used in this count, cannot and does not perform the function or office of making the count good, if it would be bad without it. The count is very little, if any, better with the use of this word in the connection in which it is used than without the use of it. It does allege that the collision was negligently caused or allowed; but it does not show any particular act, or failure to act, which caused or allowed it. No overt act nor failure to perform any particular act causing or allowing the collision is alleged or attempted to be alleged. It merely alleges that the collision was negligently allowed. This probably shows that the action is based on negligence, and not on wantonness or willfulness; but it gives no indication of any particular act, or failure to do any particular act, which proximately caused or allowed the collision or the injuries complained of. This is entirely too general and indefinite to put the defendant on notice of what, or against which it is to defend. The defendant or its agents may have been guilty of hundreds of negligent acts of commission and of omission, and of acts without which the injury would not have resulted, and yet not be civilly liable to the plaintiff for the collision or for the injuries complained of; for the reason that these acts were not the proximate or direct cause of the injury, but only the indirect or remote cause. It may be that the defendant owed the plaintiff no duty to do or to act differently, although its acts were negligent.

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in which case the defendant would not be liable, either because its negligence was not the proximate cause of the injury, or because it owed the plaintiff no duty to act otherwise. All negligence is not actionable. A man or a corporation may be guilty of negligence causing injury, and yet not be liable in damages for such injury. To render him liable it must have been actionable negligence; that is, the breach of a duty which he owed to the person injured, and it must have proximately caused the injury. It must have been the *causa causans*, not merely the *causa sine qua non*.

It is said in *Sherman & Redfield on Negligence*, § 3, that negligence, to constitute a cause of action, must be such an omission, by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as in a natural and continuous sequence causes unintended damage to the latter. As an illustration of this rule the text says, if a complaint against a common carrier should confine itself to an averment that the defendant had neglected to use ordinary care or that it was guilty of negligence in the carriage or the delivery of the goods, it would be bad without alleging that the defendant was a common carrier, or something equivalent thereto; that merely alleging that defendant was negligent, and that damages resulted to plaintiff, is not sufficient; facts must be alleged which show a duty or obligation and a breach thereof. It is said in all the texts and decisions upon the subject that there are various definitions of actionable negligence; but the authorities all agree that the word "negligence," when used in its legal sense, must obviously exclude all acts and omissions which do not violate any legal obligation or duty. If the defendant owed no duty, there can be no legal or actionable negligence. If he did owe

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a duty, but not to the person injured, then his negligence is not actionable. The complaint must state facts sufficient to show what the duty is, and that the defendant owed it to the plaintiff, not to some other person. It ought to be kept in mind in framing complaints for negligence that no action can be maintained upon an act of negligence alone, unless the breach of duty alleged is also alleged or shown to be the cause of the damage suffered. The mere fact or allegation that a defendant has been guilty of negligence followed by an accident resulting in injury does not make the defendant liable for the resulting injury. The connection of cause and effect direct must be alleged, and the defendant's breach of duty, not merely his negligent act, must be alleged, which shows the duty and the breach thereof. It is not sufficient to allege the duty or the negligence in words, but facts must be alleged which show the duty and the breach thereof, and damages proximately resulting therefrom.

The negligence of the defendant may only put a temptation in the way of a third party to commit a wrong which results in the injury of the plaintiff; but this alone does not make the defendant liable. The breach of duty alleged must not only be the cause, but it must be the proximate cause of the damage alleged. If an original act is negligent and wrongful, and will naturally, according to the usual and ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, but proper, the injury is then referred to only the wrongful cause, passing by those which are innocent; but, if the original wrongful or negligent act becomes injurious only in consequence of the intervention of some other distinct wrongful or negligent act, the injury must

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then be imputed to the last wrongful act as the proximate cause, and not to the first, which is more remote, and which probably would not have so resulted but for the last wrongful or negligent act. The rule is thus accurately stated by Judge Cooley, in his work on Torts, p. 69: "In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. (2) When the act of omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission, as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause."

Few subjects have given courts more trouble than the one of "proximate cause" as applied to negligence cases. The difficult question has been to determine what is and what is not the proximate cause of a given injury. As pointed out by text-writers and decisions, confusion and uncertainty has resulted from a failure to observe the legal, if not the literary, distinction between conditions and causes. Mr. Wharton, in his able work on Negligence, speaking to this particular subject, says (page 89): "At this point emerges the distinction between conditions and causes, a distinction the overlooking of which has led to much confusion in this branch of the law. What is the cause of a given phenomenon? The necessitarian philosophers who logically treat all the influences which lead to a particular

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result as of equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. Thus, for instance, a spark from the imperfectly guarded smokestack of a locomotive sets fire to a haystack of a neighboring field. What is the cause of the fire? The sum of all the antecedents, answers Mr. Mill, the ablest exponent of the necessitarian philosophy. Apply this concretely, and it would be difficult to see how any can be excluded from taking a place among the causes by which the fire in question is produced. Certainly we must say that either if the railroad in question had not been built (an event depending upon an almost infinite number of conditions precedent, among which we can mention the discovery of iron, of steam, and of coal), or the haystack in question had not been erected (to which there is almost an infinite number of necessary antecedents, the failure of any one of which would have caused the failure of the haystack), no fire would have taken place. The law, however, does not concern itself with refinements such as these.

The law cannot undertake to trace back the chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact, infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. *Sherman & Redfield on Negligence*, § 9. The general rule is that the damage to be recovered must be the natural and proximate consequence of the act complained of.—2 Greenl. Ev. 256. “It is not enough if it be the natural consequence; it must be both natural and proximate.”—Per Byles, J., in 8 C. B. (S. S.) 665. To maintain an action for special damages, they must be the legal and natural consequences arising from the

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tort, and not from the wrongful act of a third party remotely induced thereby.—*Crain v. Petrie*, 6 Hill (N. Y.) 522, 41 Am. Dec. 765. It is true that where the injury results from the negligence of several persons, differing only in degree, each will be held responsible for the entire damages resulting therefrom; but, where the injury immediately results from the act of one of the parties, the other, though blamable, cannot be held liable for it, unless his conduct is so connected with the act of the former that it may be said to have been the cause of it. Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal act of another, or for an injury from other causes. In such cases the injury is too remote to sustain an action for the recovery of damages. "A. places a log in the highway, which B. casts into an adjoining close, or puts an obstruction upon the sidewalk, which passersby throw into the roadway of the street, and a traveler is injured by coming in contact with it. A. cannot be held for the trespass in the one case, nor for the injury in the other."—*Cuff v. Newark & N. Y. R. R. Co.*, 35 N. J. Law, 30, 33, 10 Am. Rep. 205. If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but, if the two are successive and unrelated in their operation, one of them must be proximate and the other remote.—*Herr v. City of Lebanon*, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603. As an illustration of concurrent causes, where lumber was negligently piled, and remained a long time in that condition, and was caused to fall by the negligence of a stranger, the negligence in piling concurring with the negligence of the stranger was the direct and proximate

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cause.—*Pastene v. Adams*, 49 Cal. 87; *Bouvier's Law Dict.* 294.

Applying these principles of law to the allegations of the count in question, it is apparent that the count is insufficient. If it could be said that it shows negligence on the part of the defendant, the facts alleged show neither a duty breached, nor that the negligence complained of was the proximate cause of the injury complained of. In order to support such general averments of negligence as are found in this count, some relation such as passenger and carrier must be shown to have existed, or there must be some statute providing that a prima facie case is made against the defendant, on the showing of such state of facts, as against railroads for injuries to animals on its track, or other special case as the setting out of fire by an engine, where the presumptions of law will render allegations of the facts unnecessary. This distinction was at an early date pointed out by this court, and made clear by illustrations in the case of *Ensley Railway Company v. Chewning*, 93 Ala., 26, 9 South. 459. It was there said: "A general averment of negligence has been held sufficient, when the complaint averred that the plaintiff sustained the relation of passenger to the railroad company, or was an infant of tender years, not capable of contributory negligence, or that the injury was to stock.—*L. & N. Railroad Co. v. Jones*, 83 Ala. 376 [3 South. 902]; *Mobile & Montgomery Railway Co. v. Crenshaw*, 65 Ala. 566; *S. & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494. The statement of either of the foregoing facts has been regarded as a sufficient averment of facts showing the duty to act; but in no case, except in *Alabama & Florida R. R. Co. v. Waller*, 48 Ala. 459, has a general averment of simple negligence been held sufficient, when not accompanied by an averment of

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facts from which the duty originates. In that case the death of the plaintiff's intestate resulted from a collision. The complaint, as in this case, did not state that the decedent was a passenger or employee or had any connection with the railroad company. The ruling that the complaint contained a proper statement of facts was based on the erroneous principle that the collision itself and the consequent death of the plaintiff's intestate were facts sufficient to create a presumption of negligence, for which the defendant was responsible." The *Waller Case* was for this reason overruled by *Chewning's Case*. The former was a parallel case to the one in hand.

A principle of law and pleading often overlooked or disregarded by pleaders in negligence cases is that instead of stating the facts which show the relations of the parties, or the duties which the one owes the other, or which show that the injury complained of was proximately caused by the negligence complained of, they attempt to state the cause of action by stating the conclusions merely, or, attempting to avoid this error, they run into another as bad, of, stating the evidence by which they hope to prove the facts which will support the desired conclusions. If pleaders would remember that pleadings, as a rule, should state the facts of the case only, and not the conclusions of the pleader, nor the evidence or proof by which it is proposed to establish the facts, much of the trouble of pleadings would be avoided. These are two common and grave errors of pleaders. In negligence actions, as the authorities agree, a duty, and a breach thereof, must be shown; but it must be shown by simply alleging the facts which, aided by the law, create the duty. It is not sufficient to allege, merely as a conclusion of the pleader, that the duty existed, and was breached, but the facts

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only must be stated, which create the duty. "The decisions, observes Lord Campbell, show that the allegation of duty in a declaration is in all cases immaterial, and ought never to be introduced, for, if the particular facts set forth raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration, therefore, must stand or fall by the facts stated. Negligence creates no cause of action unless it expresses or establishes some breach of duty."—2 Add. Torts, § 1338. It is a mistake to suppose that code pleadings were intended to dispense with any averments necessary to state a cause of action; they were only intended to dispense with unnecessary ones, and to make pleadings simple and certain. To this end section 5321 of our Code provides: "All pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter to be put in issue, in an intelligible form; and no objection can be allowed for defect of form, if facts are so presented that a material issue in law or fact can be taken by the adverse party thereon." To provide against the other error, of stating the evidence, which pleaders at common law were prone to commit, section 5322 of the Code provides: "If any pleading is unnecessary prolix, irrelevant, or frivolous, or unnecessarily repeated, it may be stricken out at the cost of the party so pleading, on motion of the adverse party; and any pleading which conforms substantially to the schedule of forms in this Code is sufficient." It will be observed that these statutes provide for the statement of the simple facts merely which create the cause of action, and against stating the evidence by which the facts are to be proven; but they do not authorize the

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statement of mere legal conclusions.—*Quarles v. Campbell*, 72 Ala. 64. The Code thus says do not allege conclusions, nor evidence, but facts only.

There was no error in allowing the question propounded to plaintiff on her redirect examination: "Mrs. Ely, Mr. Dominick asked you whether or not you were nervous before that time. Did that collision, being knocked unconscious, improve that nervousness or increase it?" The only objection insisted on in brief of counsel was that the question called for "an unauthorized conclusion of the witness." The question was proper at this stage of the trial; the plaintiff had been cross-examined for the purpose of showing that she was nervous before, as well as after, the collision. It was therefore proper to show whether there was any change in her condition after the shock, and, if so, what it was. This is all the question called for, and it was therefore quite proper. There was likewise no reversible error in allowing the question propounded to the witness Dangerfield touching in what distance the motorman had stopped the car. The question was asked the witness as an expert, and he was shown to be an expert. The more orderly way would have been to first show that he was an expert; but showing it afterwards without dispute cured the error. If the court's definition of "wantonness" was inaccurate, or not clearly expressed, it affirmatively appears that this error was subsequently corrected, and all its misleading tendencies removed, by subsequent instructions.

There was no reversible error in refusing defendant's charge 2, which was as follows: "The court charges the jury that if, after a fair and full consideration of all the evidence, it leaves your minds in a state of uncertainty and confusion as to who should recover in this case, and does not reasonably satisfy you that

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the plaintiff should recover then you should return a verdict for the defendant." It is probable—though we do not so decide—that the charge could be given without committing reversible error, but it is certain that in this case it was not reversible error to refuse it, for the reason that it finds substantial duplicates, in other requested charges which were given. Similar charges were held good in the *Saxon Case*, 179 Ala. 136, 59 South. 593. That case, however, and similar charges on this particular question, have been reviewed fully by this court in a recent case.—*A. G. S. R. R. Co. v. Robinson, Infra*, 62 South. 816, and we refer to it for our views on this subject.

What we have said of charge 2 disposes of the next assignment of error relating to the refusal of charge 4.

Charge 5, refused to the defendant, was as follows: "If the jury believe from the evidence that the plaintiff's injuries resulted in consequence of a wrongful act or omission on the part of the motorman in charge of defendant's car, but only through or by means of some negligence on the part of the negro chauffeur in charge of the auto in which plaintiff was riding, from which last negligence the injury followed as a direct and immediate consequence, then plaintiff's injuries should be referred to the negligence of the negro chauffeur, and should not be traced to the negligence of defendant's motorman." This charge asserted a correct proposition of law, and it was not abstract, as applied to the evidence in this case. It could not be refused on the ground that it attempted to hold plaintiff answerable for the contributory negligence of the driver of the auto in which she was riding. It asserted the proposition of law—and that only—that if plaintiff's injuries were proximately caused by the negligence of the chauffeur, and not by the negligence of the defendant's

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motorman, then the injury should be referred to the proximate, and not to the remote, cause. A similar charge was held proper in the case of *Alabama Great Southern Railroad Company v. Vail*, 142 Ala. 141, 38 South. 124, 110 Am. St. Rep. 23.

Charge 9 was likewise a proper charge, as applied to the evidence in this case, and its refusal was error. This charge was as follows: 'If the jury believe that the negro chauffeur in charge of the automobile in which plaintiff was riding was negligent in running the automobile down the hill at the time of the collision between it and defendant's street car, and that this negligence on his part was the sole proximate cause of the collision and plaintiff's injury, then you should find a verdict for the defendant.' If the facts hypothesized in this charge were found to exist by the jury, and the charge left the question to them, and there was evidence from which the jury could so find, the defendant was not liable, and the jury should have been so instructed.

We find no substantial duplicate of these charges. Other charges like these were given, but in each of them negligence of the chauffeur was confined to one particular act of negligence, as for excessive speed, or reckless running of the car, but did not cover all the tendencies of the evidence as did these two charges. If these two refused charges had been given, they would have covered the given ones, but the given ones do not fully cover the refused ones. The other charges refused were confused and misleading.

Reversed and remanded. All the Justices (except DOWDELL, C. J., not sitting) concur in the reversal.

ANDERSON, McCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., think count 1 was sufficient. SAYRE, J.,

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thinks the count bad, but that its defect was not sufficiently pointed out by the demurrer.

McCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., think charge 5 was properly refused.

All the Justices (sitting) agree that charge 9 was good, and that it was error to refuse it.

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Injury to Person on Track.

(Decided May 15, 1913. 62 South. 885.)

1. *Railroads; Persons on Track; Injury; Pleading.*—Where the action was grounded upon wanton injury and negligence after discovery of peril, pleas which did not show by specific averment that plaintiff was conscious of his imminent danger, were subject to demurrer.

2. *Same; Instructions.*—Where plaintiff admitted his contributory negligence, but set up the subsequent negligence of the company in injuring him while walking on a railroad track in an incorporated town, along the path customarily used by the public, a charge predicated a verdict for defendant solely upon the fact that, upon discovering plaintiff on the track, and his unconsciousness of the approaching train, the engineer blew his whistle and attempted to stop the train, ignored the duty of the company to have its train under reasonable control, and to keep a lookout for persons on track, and was consequently erroneous.

3. *Same; Jury Question.*—Under the evidence in this case the question whether the failure to have the train under control and to keep a lookout for persons on the track, in view of the locality and the known use of the track, was negligence, and if so whether it was wanton, were questions for the jury.

4. *Same; Burden of Proof.*—Under the evidence in this case it was proper to instruct the jury that the burden of proof as to freedom from negligence was upon the railroad company under the provisions of section 5473, 5476, Code 1907.

5. *Appeal and Error; Showing Error; Joint Assignment.*—Where the matter of overruling certain pleas is included in one assignment, the assignment is not sustained if anyone of said pleas were bad.

6. *Same; Harmless Error; Pleading.*—Error in sustaining demurrer to special pleas is not prejudicial where all the evidence admissible under such pleas was admissible either under the general issue or other special pleas to which demurrers were overruled.

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7. *New Trial; Grounds; Conduct of Juror and Party.*—The fact that plaintiff boarded at the same place with two of the jurors, slept in the same room with them for several nights, and in the same bed with one of them, discloses such misconduct as to require the setting aside of the verdict and granting of a new trial, notwithstanding the association was not sought by either the plaintiff or the jurors, and that they had no improper motive, and testified that the trial was not discussed between them, as the relation was so intimate as necessarily to have influenced the verdict.

8. *Same.*—Where the successful party has treated, fed or entertained a juror, a new trial will be awarded on the grounds of public policy without regard to the probable effect of such conduct upon the verdict; but in the absence of any evil intent by the parties, mere casual meetings and exchange of ordinary civilities will not vitiate the verdict.

9. *Same; Motion; Requisite.*—Where the misconduct of the juror is instigated, promoted or shared in by plaintiff, the motion for a new trial, based on such misconduct, is not required to aver that defendant did not discover the misconduct complained of before the rendition of the verdict.

APPEAL from Morgan Circuit Court.

Heard before Hon D. W. SPEAKE.

Action by Luther Turney against the Louisville & Nashville Railroad Company for damages for injury while crossing the defendant's railroad track. From a judgment for plaintiff, and from the denial of its motion for new trial, defendant appeals. Reversed, motion for a new trial granted, and remanded.

Plaintiff was injured by defendant's passenger train near its station in the town of Falkville. This station, with the main track and two sidings, was located in the midst of the town, and within a few feet of a street crossing. On the side of the track opposite to the station are some storehouses, from which a pathway leads diagonally across the track, following the main track for a space, and onto the street on the other side. The town and vicinity is thickly populated, and this diagonal pathway is in almost constant use by a great number of people who pass over the track at this point; a circumstance known to the enginemen who were operating the engine that injured plaintiff. Plaintiff in-

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tended to embark on the train as a passenger, and having made some purchases at the stores referred to, proceeded along the diagonal pathway towards the station, facing away from the direction the train was approaching. He knew that the train was coming, but apparently did not realize that he was on the same track with the train, and was engaged in counting the change needed for the purchase when struck, and did not hear nor heed the alarm signals given by the engineer a few feet before the engine reached him. The speed of the train was between 10 and 20 miles an hour, according to the varying opinions of witnesses, and the track was straight and clear for 2 miles.

According to the plaintiff's witnesses, the train was about 50 to 100 yards from him when he went on the main track, and about 15 feet from him when the alarm was blown. The engineer was sitting in his usual place and looking down the track. When the whistle was given for the board, plaintiff looked up and glanced at the train, but at once looked down again and did not again look up. He walked about 25 or 30 feet on the main line before he was struck. In reply to a question by a witness asked a few minutes after the accident as to what he meant by getting run over, plaintiff replied that he thought he was on the side track. Plaintiff himself testified that he knew the train was coming, but did not see it, and did not look up because he thought he was on the side track, and did not know the train was running on the track he was on. The engineer testified that plaintiff got on the track about 50 feet in front of the engine, and that he at once sounded the alarm and applied the emergency air brakes, and that he did not succeed in attracting plaintiff's attention until he was struck. He also testified that he did not reverse the engine, being unable to do so in time,

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or as quickly as he could apply the air; but that he stopped the train as quickly as it could have been done, which was within about 150 feet of the point of collision. He further testified that the rules of the company require him to reduce his speed to 10 or 12 miles an hour in an incorporated town, but that he thought he was violating the rule on this occasion. He and the conductor estimated the speed of the train at the signal board 100 yards away at 20 or 25 miles per hour.

Count 1 is for subsequent negligence, counts 2, 3, and 4 for general simple negligence, and counts 5 and 7 for wanton, negligent, or intentional injury. The case was submitted to the jury on these counts, and on defendant's plea 1, which is the general issue, and the following special pleas:

(2) "For answer to counts 1, 2, 3, and 4, separately, defendant says plaintiff was guilty of negligence on his part which proximately contributed to the injuries complained of in this: That plaintiff attempted to cross the track of defendant as its train was running at a rapid rate of speed, and the place where he attempted to cross was in such close proximity to the engine that the same could not have been stopped by the engineer after his discovery of plaintiff's presence upon the track in time to have prevented injuring him, and defendant avers that plaintiff got upon said track and between the rails on which said engine was running, well knowing that said engine was approaching at a rapid rate of speed in full view of him, and in close and dangerous proximity to him, and was seen by him at the time he got between said rails, and without making an effort on his part to get beyond said rail, which he had ample time to do, and which he knew he had time to do, and thereby avoid being hit by said engine, but which he carelessly and negligently failed to do."

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(9) "Furthermore answering counts 1, 2, 3, and 4, defendant says that plaintiff was guilty of negligence on his part, which proximately contributed to the injury complained of in this: That, after said alleged discovery of plaintiff's danger by defendant's servant, said servants in charge of said train gave notice of its approach by sounding the whistle and using all preventive efforts to stop said train, and defendant avers that at said time the said plaintiff had knowledge, and notice, and warning of the approach of said train and its dangerous proximity to him, and negligently and carelessly remained upon the track of defendant, and received the injuries complained of, without the engineer being able to prevent said injuries."

The following is charge 1, refused to the defendant: "If you believe from the evidence that, after the alleged discovery of plaintiff's danger by defendant's servants, said servants in charge of said train gave notice of its approach by sounding the whistle and using all preventive effort to stop said train, and that at the same time plaintiff had knowledge, and notice, and warning of the approach of said train and its dangerous proximity to him, but negligently and carelessly remained upon the track of defendant, and received the injuries complained of, without the engineer being able to prevent said injury, your verdict should be for the defendant."

Charge 1, given at request of plaintiff, is as follows: "(1) Gentlemen of the jury, I have just charged you at the request of defendant as follows: If any one of your number are not reasonably satisfied from the evidence that plaintiff is entitled to recover, you cannot find a verdict in favor of the plaintiff. This means, gentlemen, that you must all agree upon the verdict, but

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would not authorize you to find a verdict for defendant."

There was verdict and judgment for plaintiff for \$10,500, and defendant moved for a new trial, and, among others, assigned the following grounds:

(5) "There was undue influence used by plaintiff upon two of the jurors in this cause in this: That, after the argument in said cause had been completed and the jury charged by the court, they retired about 10 o'clock to consider their verdict, and about 11:20 at night of Friday, Oct. 20th, the court discharged such jury under instructions until the next morning at 8 o'clock, and after they were discharged, and while said cause was pending before them for consideration, the plaintiff on said night slept in the room with two of said jurors, and one of them slept in the same bed with him.

(5½) "There was improper conduct on the part of the plaintiff and two of the jurors engaged in the trial of this cause in this: That, after the jury was impaneled and until the verdict of the jury was rendered in this cause, the plaintiff slept in the same room with two of the jurors, and on one or two nights during the trial plaintiff slept in the same bed with one of the jurors. That they undressed at night and dressed in the morning in the presence of each other, ate meals together, washed in the same bowl, and plaintiff went to and from their meals together with said jurors."

EYSTER & EYSTER, for appellant. The court was in error in sustaining demurrer to pleas 3 and 5.—*Andrews v. B. M. R. R. Co.* 99 Ala. 440; *A. G. S. v. McWhorter*, 156 Ala. 277; *C. of Ga. v. Blackmon*, 53 South. 807; *L. & N. v. Young*, 153 Ala. 235; *Benson v. L. & N.* 116 Ala. 202. The court should have given charges 1 and 2 requested by defendant.—*L. & N. v. Young*,

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supra. The court should have granted motion for a new trial.—*Craig & Co. v. Pearson L. Co.* 169 Ala. 548; *B. R., L. & P. Co. v. Drennen*, 57 South. 876; 42 A. & E. Law, 519.

J. B. BROWN, A. A. GRIFFITH, and KYLE & HUTSON, for appellee. The assignment of error as to pleas 3 and 4 is single, and if demurrer was properly sustained to either plea, the assignment is not sustained.—*Aetna L. I. Co. v. Laster*, 153 Ala. 630; *Brent v. Baldwin*, 160 Ala. 635; *Craig v. Pearson L. Co.* 169 Ala. 551. Assignments of error 29, 30 and 31 are indefinite.—*Clafflin & Co. v. Rosenburg*, 101 Ala. 213. Counts 1, 2, 3 and 4 are good as subsequent negligence counts.—*C. of Ga. v. Foshee*, 125 Ala. 199; *A. G. S. v. McWhorter*, 156 Ala. 281; *L. & N. v. Calvert*, 55 South. 812. The defendant's pleas were subject to the demurrers interposed.—*A. G. S. v. McWhorter, supra*; *Johnson v. B. R., L. & P. Co.* 149 Ala. 534; *C. of Ga. v. Blackmon*, 169 Ala. 304. Even if the demurrers were erroneously sustained to some of the pleas such ruling was harmless, as the same evidence was admissible under other pleas, and under the general issue.—*Montgomery County v. Pruitt*, 57 South. 823; *L. & N. v. Posey*, 96 Ala. 262. Under the statute the duty was on the railroad to acquit itself of negligence.—Secs. 5473, 5476, Code 1907; *C. of Ga. v. Wood*. 129 Ala. 486. The questions of subsequent negligence and proper use of preventive measures were jury questions.—*C. of Ga. v. Blackmon, supra*; *B. R., L. & P. Co. v. Smith*, 121 Ala. 355. The court properly denied the motion for a new trial.—16 A. & E. Enc. of Law, 519; Thompson & Merriam on Juries, secs. 425-436; *K. C. M. & B. v. Phillips*, 98 Ala. 172; *Clay v. City of Montgomery*, 102 Ala. 297; 29 Cyc. 796-7. The burden was on the movant to show want of knowledge on

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his part of the relation before the verdict was rendered.—*Ala. L. Co. v. Cross*, 152 Ala. 562; 29 Cyc. 955-6; 91 Ga. 344.

SOMERVILLE, J.—On the trial in the court below it was not disputed but that plaintiff was a trespasser on defendant's track, and was guilty of contributory negligence in going thereon as he did. Plaintiff's case, therefore, was that defendant's servants failed to use due diligence to stop or slacken the speed of the train and so to avoid injuring plaintiff after discovering his peril, having time and opportunity to do so; or that they wantonly injured him. The latter phase of the case included in issue not only the wanton negligence of the enginemen in not stopping or slackening the speed of the train with an actual knowledge of plaintiff's imminent peril, but also their wanton negligence in running the train through an incorporated town and densely populated locality at a dangerous rate of speed and without proper vigilance or control, and over a section of track in constant use as a foot-way by great numbers of people.

The plea of the general issue imposed upon plaintiff the burden of affirmatively proving these issues; while pleas 2 and 9 sought to avoid the effect of proof of defendant's subsequent negligence by showing that plaintiff himself was guilty of still later negligence in remaining on the track until he was struck, with knowledge that the train was approaching and would strike him if he so remained.

Demurrers were sustained to defendants special pleas 3, 4, 5, 6, 7, 8, 10, 11, and 12, and error is assigned therefor. All of these, except plea 3, were subject to the ground of demurrer that they did not show by specific averment, or unequivocal statement of facts, that plaintiff was conscious of his imminent danger.

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Plea 3, however, is coupled in assignment with defective plea 4, and so the assignment cannot be sustained. So pleas 5, 6 and 7, and pleas 8, 9, 10 and 11, are grouped in assignment, and any one of either group being defective, the whole assignment is bad.

But reversible error cannot be imputed with respect to any of the rulings on these pleas for the reason that, in so far as they set up plaintiff's subsequent negligence, or last clear chance to escape injury, that issue was fully available to defendant under plea 9 and with a diminished burden as to collateral averments; and, in so far as they were merely a traverse of plaintiff's case, all of their averments were open to proof under the general issue. And, in fact, both issues were clearly framed by the evidence, and fairly presented to the jury under the instructions of the court. No prejudice resulted to defendant by reason of the elimination of these pleas, and it is unnecessary to further discuss their merits.

We do not find that charge 1, refused to defendant, is referred to in any assignment of error.

Charge 2, refused to defendant, is defective in that it requires a verdict for defendant upon the predicate solely that upon the discovery of plaintiff's presence on the track, and his inadvertence to the approaching train, the engineer blew the whistle, and put in operation the appliances at his command to avoid the collision. That ignores that aspect of defendant's liability based upon the duty of its enginemen to have the train under reasonable control, and to keep a lookout and discover persons who might be upon the track at the point of the collision.

Whether the enginemen were guilty of negligence in these particulars, and, if so, whether it was wanton negligence, in view of the locality and the known hab-

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itual use of the track at that point by the public, were questions for the jury on the whole evidence.—*So. Ry. Co. v. Stewart*, 179 Ala. 304, 60 South. 927, and cases cited. If limited to the other phases of the case, the charge would have been a correct statement of the law.

The failure of the defendant's engineer, after discovering plaintiff in imminent peril on the track, to use all the means within his power known to skillful engineers to stop the train before plaintiff was injured would, under some tendencies of the evidence, have been a negligent breach of duty. The injury occurred in an incorporated town; and charge 2, given for plaintiff, correctly placed the burden of proof as to its freedom from negligence upon the defendant company.—Code 1907, §§5473, 5476.

Other assignments of error relating to rulings upon the evidence and to charges given or refused are not argued, and will not be considered.

On the issue of misconduct on the part of plaintiff and two of the jurymen, and undue influence upon them by association with plaintiff during the trial, as presented by defendant's motion to set aside the verdict, the following facts are shown without dispute:

The jury was impaneled for the trial of this case on Wednesday evening. Two of the jurors, Parker and Hawkins, were staying at the boarding house of a Mrs. Porter. They occupied the same room, in common with one Smith, a grand juror, and one Speigle, a petit juror not serving in the *Turney Case*. On Wednesday night plaintiff applied to Mrs. Porter for board and lodging, and was assigned by her to the room occupied by Parker and Hawkins, which contained three beds. On that night plaintiff slept in the bed with Parker, Hawkins sleeping in one of the other beds. On Thursday night all three of them slept in the room in dif-

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ferent beds. On Friday night the judge charged the jury, and after deliberating about an hour the jury separated for the night and left the courthouse at 11:30 p. m. Plaintiff there joined Parker and they walked to the boarding house together by themselves, stopping for a while on the way. Plaintiff, Parker and Hawkins again slept in the same room that night. On Saturday morning the jury rendered a verdict for plaintiff for \$10,500.

During the course of the trial plaintiff ate all of his meals at the same table with Parker and Hawkins, and many times walked to and from the courthouse with Parker, in company with others. In their room they dressed and undressed in each other's presence, and shared by turns the use of its simple conveniences. All of them testify that there was no conversation at any time between plaintiff and the jurors in regard to the case on trial.

Plaintiff says he does not remember talking with Parker as to where the latter was boarding before plaintiff went to Mrs. Porter's. But Parker says: "There was something said about a boarding place, and I told him where I was boarding; my best recollection is he did not say he would go there, but he did go there for supper that night." Plaintiff says his father directed him to go there, and that he made no request to be placed in the room with the jurors. Mrs. Porter also says she placed him in that room without any request from him, because she had no other available place for him.

Plaintiff was a youth of 19 years, born and raised eight miles from the village of Falkville; and Parker was a neighbor living a mile or so away with whom he was on friendly, but not intimate, terms; while Hawkins lived about eight miles distant from plaintiff.

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Plaintiff says he was never in court, and never had anything to do with litigation before this time. He has attended eight sessions of school of six months each.

The effect of misconduct on the part of jurors and parties has often been considered by the courts. It is generally held that where a juror has been treated, fed, or entertained by the successful party a new trial will be granted upon consideration of public policy, without regard to the probable effect of such conduct upon the verdict.—Thomp. & Mer. on Juries, § 372; *Craig v. Pierson Lumber Co.*, 169 Ala. 548, 53 South. 803; *Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677. But casual meetings and the interchange of casual and ordinary civilities between a party and a juror during the recesses of the court, no sinister design being apparent, will not ordinarily suffice to avoid the verdict, if the court can clearly see that it could not have had any effect on the mind or sentiment of the juror.—2 Thomp. on Trials, § 2559, and cases cited; *Alpena Tp. v. Mainville*, 153 Mich. 732, 117 N. W. 338; *Ga. Central Ry. Co. v. Hammond*, 109 Ga. 389, 34 S. E. 594; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Ford v. Holmes*, 61 Ga. 419.

The facts here shown are most extraordinary, and it may well be doubted if judicial annals can present a parallel. The social relation of roommate and bedfellow is necessarily an intimate one, and, when protracted for several days and nights, as here, it is impossible to rationally assume that such a relation has not engendered an interest and a sympathy entirely out of the ordinary, and which will find expression, conscious or unconscious, in any action by either party affecting the interests of the other. We have given very careful consideration to the facts before us, and we cannot es-

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cape the conclusion that this verdict, rendered in part, at least, by these two jurors, Parker and Hawkins, cannot be permitted to stand. To hold otherwise would, we think, be an affront to common decency and decorum, and would furnish a demoralizing precedent for the degradation of verdicts and the pollution of the judgments of courts. It would, indeed, imperil the purity of judicial administration, and destroy public confidence in its justice and impartiality—for it is safe to say that no victim of a hostile verdict under such conditions as these could ever be made to feel that he had had a fair trial by an unbiased jury. As said, per DOWDELL, C. J., in *Craig v. Pierson Lumber Co.*, 169 Ala. 548, 552, 53 South. 803, 805: "Aside from protecting the rights of parties in the fair and impartial administration of justice, respect for the courts calls for their condemnation of any improper conduct, however slight, on the part of a juror, of a party, or of any other person, calculated to influence the jury in returning a verdict. So delicate are the balances in weighing justice that what might seem trivial under some circumstances would turn the scales to its perversion. Not only the evil, in such cases, but the appearance of evil, if possible, should be avoided." See, also *B. R., L. & P. Co. v. Drennen*, 175 Ala. 338, 57 South. 876.

It is no answer to say that the obnoxious association was not initiated by the choice of the parties. It was continued by them, without objection by either, and without the slightest effort to interrupt it. It was in no sense necessary or compulsory, and it was the plain duty of each of them to avoid it; and its renewal by them each day must be regarded as a new and voluntary offense. If necessary, the jurors should have reported the matter to the court without delay. The impropriety of the continued intimacy was so gross and

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so fundamental that neither the ignorance nor the inadvertence of the offending parties can excuse or palliate it. A party litigant who does not understand the gravity of such an offense must be made wise even at the cost of setting aside his verdict.

The trial court should have set aside the verdict, and directed another trial. Its judgment overruling defendant's motion in that behalf will be reversed, the motion will be here granted, and the cause will be remanded for another trial.

It is urged in avoidance of this result that the motion was properly refused because it contained no averment that defendant or its counsel did not discover the misconduct complained of before the rendition of the verdict, and the evidence does not show their ignorance of it. The rule invoked, though generally prevailing, has no force in a case where the misconduct of the juror is instigated, prompted, or shared in by the adverse party himself. It cannot be applied here.—*Craig v. Pierson Lumber Co.*, 169 Ala. 548, 553, 53 South. 803.

Reversed, rendered, and remanded. All concur, except DOWDELL, C. J., not sitting.

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Damages From Overflow.

(Decided June 5, 1913. 62 South. 802.)

1. *Waters and Water Courses; Nuisance; Dam; Complaint.*—A complaint alleging that defendant owned and controlled certain lands upstream from plaintiff's lands, and had constructed and maintained a high dam across the stream which collected a large body of water and held the same until the occasion of the injury when the dam broke and water flowed over plaintiff's land, washing away the soil on a large area of plaintiff's farm, which was very fertile and productive before it was washed away, but was now permanently injured

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and damaged by reason of the dam breaking and washing the same away, was subject to demurrer for a failure to allege that the injury was due to the negligence of defendant in the construction or maintenance of the dam.

2. *Same; Riparian Proprietors; Rights; Construction of Dam.*—For his own lawful purposes, a riparian land owner may dam the water on his own land, and in doing so is not an insurer of the safety of the structure, but is only required to exercise due care and skill in the construction and maintenance thereof that his lower neighbors may not be injured by its accidental breaking.

3. *Same.*—In estimating the hazard to his lower neighbors by the construction of the dam, the upper riparian proprietor must take into consideration geographical situations and climatic history in order to care for conditions reasonably to be expected, whether of frequent or infrequent occurrence; if, however, after he has taken such precaution his dam is washed away by unprecedented flood without proximate, concurrent negligence on his part, he is not liable for damages.

4. *Same; Right to Erect.*—A dam constructed on a stream by an upper riparian proprietor is not a nuisance per se, and only becomes such when it is negligently constructed or maintained.

APPEAL from Franklin Circuit Court.

Heard before Hon. C. P. ALMON.

Action by Kate Wilson and another against the the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

The complaint alleges in effect that plaintiffs were in possession of and owned certain lands which are described, and that at the time of the injuries complained of the defendant owned and controlled or had possession of certain lands near to plaintiff's land but above plaintiff's land, which were lower and subservient, and that prior to the injuries complained of defendant had constructed a large and high dam across a stream running through the lands of both plaintiff and defendant, and that said dam had collected a large body of water which was held by said dam until on or about April, when said dam broke, and the water flowed upon and over plaintiff's land, washing away the soil of a

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large area of plaintiff's farm, which plaintiff alleges was fertile and productive until it was washed away, but that now it is permanently injured and damaged by reason of the said dam breaking and washing the same away.

ALMON, ANDREWS & PEACH, for appellant. The court erred in overruling demurrers to the complaint.—*Ala. C. C. & I. Co. v. Turner*, 145 Ala. 639. Plea 2 sets up a proper defense, and the court erred in striking it from the file.—*Powell v. Crawford*, 110 Ala. 300; *Stuart v. Hargrove*, 23 Ala. 249. As to the general rule of holding that defendant would not be liable unless his negligence in construction or maintenance was the proximate cause of the injury, and that he would not be liable where the break was caused by an unprecedented rainfall, see.—*So. Ry. v. Plott*, 131 Ala. 312; *Shahan v. A. G. S.*, 115 Ala. 181; s. c. 116 Ala. 302; *Cent. Ry. v. Windham*, 126 Ala. 552; *Coosa River S. Co. v. Barclay*, 30 Ala. 120; *Smith v. Western Ry.*, 11 L. R. A. 619; 40 Cyc. 575-6; 13 Enc. of Law 1st Ed. 697; *Gulf R. Co. v. Walker*, 132 Ala. 553.

W. H. KEY, and A. H. CARMICHAEL, for appellee. Defendant's demurrers to plaintiff's complaint should have been overruled, and the defendant's special plea was correctly stricken. The issue was not one of negligence, but did defendant build a dam that broke, and was plaintiff's injured thereby.—*Alabama Western R. Co. v. Wilson*, 55 South. 932; *Southern Ry. Co. v. Lewis*, 165 Ala. 555; *Central of Ga. R. R. Co. v. Windham*, 126 Ala. 560; *Savannah, Amer. & Montgomery Ry. Co. v. Buford*, 106 Ala. 303; *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 161 Ala. 278; *Crabtree v. Baker*, 75 Ala. 91.

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SAYRE, J.—Appellant's demurrer to the complaint on the ground substantially that plaintiffs' (appellees') injury was not laid to negligence in the construction or maintenance of the dam should have been sustained. Appellees have cited a number of cases in all which there was an original wrong in the structure or operation which caused injury, as, for example, defendant dammed up water so causing it to overflow plaintiff's land, or defendant caused water to flow upon plaintiff's land which was accustomed to flow elsewhere, or there was an original encroachment of some character upon plaintiff's land, all which acts were wrongful of course, were nuisances for the consequences of which the defendants in those cases were liable without regard to whether or not there was negligence, for no degree of care would excuse a wrong of that character. But the owner of land may for his own lawful purposes dam up the water of a stream on his own land, and doing so, he does no wrong. He is not an insurer of the safety of such structure, but he must exercise due care and skill in construction and maintenance to the end that his lower neighbors may not be injured by accidental bursting. In estimating the hazard to his neighbors, the proprietor must take into consideration climatic history and geographical situation so as to be able to care for conditions that may be reasonably expected, whether of frequent or infrequent occurrence. If, after he has taken these precautions, his dam is washed away by unprecedented flood, without the proximate concurrence of negligence on his part, he is not liable for resulting damages.—40 Cyc. 683; *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 375; *Ala. Consol. Co. v. Turner*, 145 Ala. 639, 39 South. 603, 117 Am. St. Rep. 61. In other words, if defendant was liable for the damages suffered by plaintiffs, it was liable, not on

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the ground that its dam was a nuisance per se, but on the ground that there was negligence in its construction or maintenance, which is to say it was a nuisance only in the event it was negligently constructed or maintained. It was necessary, therefore, for the complaint to show, by proper averment, negligence in the construction or maintenance of the dam. In the ruling on demurrer to the complaint, and in other rulings made in the progress of the trial, the trial court very plainly proceeded on the theory that defendant should be held as an insurer against injury by the bursting of the dam. This was an erroneous view of the case, and, because it found expression at several points, a reversal must be ordered.

Reversed and remanded.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

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Damages for Serving Unwholesome Food.

(Decided June 19, 1913. 62 South. 851.)

1. *Food; Sale of Spoiled Food; Negligence.*—A railroad company would not be liable under section 7074, Code 1907, to one made sick by serving spoiled oysters in a dining car, if neither it nor its servants were negligent with respect to serving the oysters.

2. *Same; Care Required.*—A keeper of a restaurant or hotel serving customers meals, must exercise the same degree of care in selecting and preparing food which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in preparing food for his own private table, and is liable for injury to customers in failing to do so.

3. *Same; Burden of Proof.*—One suing a railroad for damages suffered from sickness caused from eating oysters in one of its dining cars, has the burden of showing to the reasonable satisfaction of the jury that he was served with spoiled food through defendant's negligence.

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4. *Same; Instructions.*—Where the evidence showed that the oysters were purchased about twelve hours before they were served, and there was also evidence that a reasonably prudent person engaged in that business would have examined the oysters before serving them to ascertain if they were apparently fresh and wholesome when cooked, a charge that if defendant and its agents exercised ordinary care in selecting, purchasing and keeping the oysters which were served to plaintiff, they should find for defendant, ignored the duty of defendant to inspect the oysters before serving and was consequently erroneous.

5. *Same.*—A charge asserting that if defendant exercised ordinary care in selecting and keeping the oysters, plaintiff could not recover, though he was served with a spoiled oyster, was calculated to mislead because neglecting to define the character of the ordinary care required of a restaurant keeper.

6. *Same.*—Where the court instructed that defendant was not a guarantor of the soundness of every oyster furnished, and if it exercised ordinary care in selecting, keeping and preserving its oysters, including those furnished plaintiff, and did not knowingly furnish plaintiff with unwholesome oysters, the jury should find for defendant; also that the burden was on plaintiff to show negligence on the part of defendant or its employees in selecting the oysters, and that if the oysters served plaintiff were from a reputable dealer in bulk, in the usual course of such dealings, and were in an apparent fresh, safe and sound condition, so far as defendant could discover by inspection, defendant was not guilty of negligence in serving the oysters cooked as ordered by plaintiff, and taken from the bulk, such instructions were calculated to mislead, and should not have been given.

7. *Same.*—A charge asserting that if defendant inspected the oysters through its chief cook or chef before they were fried and served to plaintiff, and that if they were then wholesome and fresh, defendant discharged its duty to plaintiff, was misleading in the use of the word "before" where the word "when" should have been used.

8. *Same; Evidence.*—The fact that the sight of an oyster causes plaintiff unpleasantness is not evidence tending to show that the oysters he ate, the basis of the action for damages for serving unwholesome oysters, were the cause of his sickness.

9. *Damages; Items; Wages.*—Where the employer of plaintiff during his sickness and convalescence, continued to pay him his usual wages, he could not recover, in an action for damages for negligently causing said sickness, from defendant for loss of time from his work during such sickness.

10. *Charge of Court; Reasonable Doubt.*—A charge that if anyone of the jurors is not reasonably satisfied from the evidence that plaintiff is entitled to recover, the jury cannot find for plaintiff, is proper.

11. *Negligence; Ordinary Care.*—Ordinary care is that care which ordinarily prudent persons exercise under the same or similar circumstances, and a want of that care is negligence.

12. *Evidence; Opinion Evidence.*—While one made sick by eating spoiled oysters may testify as to his symptoms after eating them, he cannot properly testify as to the cause of such symptoms, that being a question for the jury to determine.

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13. *Same; Opinion.*—While a medical witness testified that spoiled oysters being eaten might have or could have produced plaintiff's sickness, it was not proper for him to testify that the sickness was caused from eating spoiled oysters, as that was for the jury to determine.

14. *Same; Expert; Common Knowledge.*—Where a witness had testified that spoiled oysters could be detected by casual examination, further evidence by him that the proper thing to do when taking oysters to prepare them for food, is to examine them one by one before serving, was a matter of common knowledge, and not the subject of opinion evidence.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by M. B. Travis against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The substance of count 1 sufficiently appears. Count 3 alleges the operation by defendant of a dining car where it sold articles of food to passengers for immediate consumption, guaranteeing the same to be pure and wholesome, and on a certain day, through its agents or servants, sold and served to plaintiff in said dining car for immediate consumption, which plaintiff then and there immediately consumed as food, tainted, deleterious, or unwholesome oysters, as proximate consequence of which plaintiff was made sick and sore, etc.

The following charges were given to the jury at the instance of the defendant:

"(1) Plaintiff is not suing in this action for any violation of defendant's duty to him as a passenger on its train.

"(2) It matters not whose duty it was to inspect the oysters before service; if you believe from the evidence that they were fresh, wholesome, and sound, defendant is not liable to plaintiff in this action."

"(4) The mere eating of the oysters by plaintiff and the fact that he was sick afterwards does not by itself show any negligence on the part of defendant.

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"(5) If you believe from the evidence that the oysters served and furnished plaintiff on the occasion mentioned were purchased by defendant in bulk in due course of trade from a reputable dealer in a market house in New Orleans on the morning of the day the same was served, and that they were fresh so far as defendant could know or ascertain by inspection, and were in such condition at the time the same was served to plaintiff, then your verdict must be for defendant."

"(3) In no event can the plaintiff recover for loss of time if you believe from the evidence that he received his wages for the time he was sick."

"(6) The gravamen of this action is the negligence of defendant in serving oysters to plaintiff. The plaintiff has alleged such negligence on the part of defendant, and I charge you, as a matter of law, that he cannot recover without proof of such negligence, and, if from all the evidence such negligence has not been proven to your reasonable satisfaction, your verdict should be for the defendant.

"(7) You cannot find for the plaintiff unless the evidence reasonably satisfies you that the injuries complained of were the result of eating tainted, deleterious, or unwholesome oysters, negligently furnished by defendant; and, if you believe from the evidence that said injuries were produced by any other cause, your verdict must be for the defendant."

(10) Affirmative charge as to third count.

"(11) Plaintiff has alleged, in the only count now before you for consideration, that defendant furnished plaintiff unwholesome, deleterious, or tainted oysters, and if the evidence fails to establish to your reasonable satisfaction the negligence of defendant in this respect, or if said evidence fails to establish to your reasonable satisfaction that the oysters furnished were tainted, de-

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leterious, or unwholesome, and that the injuries complained of were caused by reason thereof, your verdict should be for the defendant.

“(12) If you believe from the evidence in this case that any oyster served to plaintiff on the occasion mentioned in the complaint was unsound or unwholesome, putrid, or spoiled, and this fact was unknown to defendant, and could not have been discovered by defendant in the exercise of reasonable care, and was not in such condition knowingly served by the defendant to plaintiff, your verdict must be for defendant.

“(13) Before you can find a verdict for plaintiff in this case, you must be reasonably satisfied by the evidence that the oysters in this case consumed by plaintiff were tainted, deleterious, or unwholesome, and that they caused the sickness of plaintiff, and that such condition of the oysters was on account of the negligence of defendant, its servants or agents.”

“(16) In the absence of negligence on the part of defendant, its servants or agents, you cannot find for the plaintiff.”

“(14) If any one of your number is not reasonably satisfied from the evidence that the plaintiff is entitled to recover, you cannot find a verdict for plaintiff.”

“(18) The defendant is not liable as an insurer of the oysters served to plaintiff, and therefore is not liable if he was made sick by eating them, unless the jury believe from the evidence that defendant was guilty of negligence.

“(19) The court charges the jury that plaintiff cannot recovered under the second count of the complaint without the evidence showing to your reasonable satisfaction that the oysters consumed by plaintiff were tainted, putrid, deleterious, or unwholesome.

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“(20) If you believe from the evidence that defendant inspected said oysters through its chief cook or chef before they were fried and served to plaintiff, and that they were wholesome, sound, and fresh at that time, then defendant discharged the duty that it owed to plaintiff and will not be liable in this action.”

“(8) The defendant is not a guarantor under the law of the soundness of each and every oyster furnished to fill the orders of plaintiff, and if you believe from the evidence that defendant exercised ordinary care in the selection, keeping, and preserving of the oysters to be furnished to its customers, including the plaintiff, on the occasions mentioned, and that it did not knowingly furnish in filling plaintiff's order, an oyster or oysters that were tainted, putrid, deleterious, or unwholesome your verdict should be for defendant.

“(9) If you believe from the evidence in this case that the defendant and its servants and agents exercised ordinary care in the selection, purchase, and keeping of said oysters, then even if there was a spoiled oyster among same, and that same was served to plaintiff, your verdict must be for the defendant.”

“(15) The burden is upon the plaintiff to show some negligence on the part of defendant, its servants or employees, as to the selection of said oysters.”

“(17) If you believe that the oysters served to plaintiff were purchased from a reputable dealer on April 7, 1910, in bulk and in a bucket in the usual course of such dealings in such articles as food stuffs, and were in an apparent fresh, safe, and sound condition so far as defendant knew or could discover by such inspection, then it is not guilty of any negligence in serving said oysters cooked as ordered by plaintiff and taken from said bulk.”

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J. B. BROWN, A. A. GRIFFITH, and F. E. ST. JOHN, for appellant. Under section 7074, Code 1907, defendant was the insurer of wholesomeness of the food served to plaintiff and specific averments and proof of negligence are not essential.—*State, ex rel. Robinson v. McGough*, 118 Ala. 166; *Kelly v. Burke*, 132 Ala. 243; *K. C. M. & B. v. Flippo*, 138 Ala. 488; *Sloss-S. S. & I. Co. v. Sharpe*, 161 Ala. 435. The offer of articles of food for consumption immediately implies that the food is wholesome and fit for consumption, and raises the legal implication of a guarantee of its soundness.—*Pantaze v. West*, 61 South. 42; 56 South. 906; 18 Pick. 62; 7 Am. Dec. 339; 73 Am. Dec. 174; 139 Mass. 411; 12 Johnson 468; 85 Atl. 396; Addison on Contracts, sec 621. It is a matter of judicial knowledge that an oyster is an annual.—22 Enc. Brit. p. 424. The purpose of the statute is to protect the public from deleterious and unwholesome food regardless of the intent of the seller, and therefore it is immaterial whether it be fish or flesh.—48 Am. Rep. 638. It is competent for plaintiff to state what caused his sickness.—*Brantley v. State*, 91 Ala. 49. The physician's evidence is also competent.—*So. Ry. v. Hobbs*, 151 Ala. 335; *Lovelady v. B. R. L. & P.*, 161 Ala. 494; *Dixon v. State*, 139 Ala. 104. The oral charge of the court was error.—*Sloss-S. S. & I. Co. v. Inman*, 129 Ala. 429. Under the following authorities, the court erred in the charges given for defendant.—21 L. R. A. 139; 40 L. R. A. (N. S.) 48, and authorities cited supra. Charge 1 was certainly erroneous.—*L. & N. v. Weathers*, 163 Ala. 52; *L. & N. v. Harrington*, 52 South. 57. Charge 4 was erroneous.—*Pantaze v. West, supra*.

GEORGE H. PARKER, and EYSTER & EYSTER, for appellee. Count 1 was subject to demurrer interposed,

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and count 3 was not proven, and hence, the verdict was correct.—*Sheffer v. Willoughby*, 54 Am. St. Rep. 483; 33 South. 190.

DE GRAFFENRIED, J.—The Louisville & Nashville Railroad Company maintains, for the convenience and comfort of its passengers, dining cars on some of its passenger trains. The plaintiff, B. M. Travis, was on April 7, 1910, a passenger of the defendant railroad company and some time that evening (probably about 7 p. m.) went into the dining car attached to his train and ate some fried oysters and some scrambled eggs. Shortly thereafter (perhaps 15 or 20 minutes) he was taken sick and his symptoms all indicated that his sickness was probably due to the food which he ate while in the dining car. This sickness of the plaintiff the plaintiff claims was a serious matter. He claims that he was confined to his bed for a long time; that his life was in serious danger; that he incurred much expense in apothecary and doctors' bills; and that he endured much physical pain and mental distress. The plaintiff is of the opinion that the oysters which were served to him in the dining car were spoiled and that they were the cause of all his distress. He is of the further opinion that the defendant's servants or agents were guilty of negligence in serving him the oysters in their alleged spoiled condition, and this suit was brought by the plaintiff against the defendant for the recovery of the damages which he alleges he suffered by reason of said alleged act of negligence on the part of the servants or agents of the defendant.

1. Section 7074 of the Code of 1907 provides as follows: "Any butcher or other person who sells, or offers or exposes for sale, or suffers his apprentice, servant, agent, or other person for him, to sell, offer, or ex-

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pose for sale, any tainted, putrid, or unwholesome fish or flesh, or the flesh of any animal dying otherwise than by slaughter, or slaughtered when diseased, for the purpose of being sold or offered for sale, must, on conviction, be fined not less than twenty nor more than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months."

The above statute is not *aimed at* but was passed for *the benefit of* hotels, restaurants, and public eating houses, as well as for the benefit of those who prepare and eat their food at their own homes.

A butcher, market man, or other person who sells fish, flesh, etc., to hotel keepers, restaurant keepers, public entertainers, or to private individuals should know something about when the fish or the animal whose flesh he sells was killed, and how it has been kept since it was killed, and, as his customers must rely in large measure upon his diligence, good faith, and intelligence, the above statute was passed for the purpose of enforcing the performance of a duty which the nature of such occupations creates in favor of the public. Common experience teaches that public entertainers as well as private individuals must, in a great measure, rely upon the honesty and good sense of the man from whom they purchase the supplies which find their way through the kitchen into the dining room.

The first count of the complaint was drawn upon the theory that, under the terms of the above-quoted statute, the defendant was liable to the plaintiff *if* the oysters were in fact *spoiled* and his sickness was created by reason thereof, *although* neither the defendant nor any of its servants or agents were guilty of *any* act of negligence in or about said oysters or in or about serving them to the plaintiff.

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The above statute has no application to the facts of this case, and the trial court was free from error in sustaining the defendant's demurrer to said count.

2. A restaurant keeper warrants that the food which he serves in his restaurant belongs to that *class* of food which is generally accepted to be fit for ordinary human consumption, and that he has used, in the selection and preparation of his food, that degree of care which the law exacts of those who follow his occupation for a livelihood. The law requires that, in the selection of the food for his restaurant and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. If, in the selection of such food or in preparing it for his customer, the keeper of a restaurant does not exercise *that* care, and through such *want* of care his customer who eats the food so selected and prepared is thereby made sick, *then* he is liable to such customer for the damages so suffered by him.—*Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715.

The trial court committed no error in giving affirmative instructions to the jury on behalf of the defendant, at the written request of the defendant, as to count 3 of the complaint.

3. The only question, under the evidence in this case, for the jury was whether the dining car servants of the defendant served the plaintiff with tainted or spoiled oysters, and if so, whether *this* was due to negligence of the servants or agents of the defendant. There was no

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evidence and no claim that the oysters served the plaintiff were improperly cooked or prepared.

As, therefore, the burden was upon the plaintiff to show to the reasonable satisfaction of the jury that, through the negligence of the defendant or its agents or servants, he was served with tainted or spoiled oysters, the court, under the evidence in this case, committed no error in giving to the jury written charges 1, 2, 4, 5, 6, 7, 10, 11, 12, 13, 16, 18, and 19.

4. The evidence discloses that during the period of the plaintiff's sickness and convalescence his employer continued to pay him his customary wages. Written charge 3 was therefore properly given to the jury.

5. Written charge 14 has been repeatedly upheld by this court.

6. We are, however, upon reconsideration of this case, of the opinion that the trial court committed reversible error in giving written charge 9 to the jury at the written request of the defendant. The charge is somewhat involved, but its plain meaning is that, if the servants of the defendant used ordinary care in the selection and purchase of the oysters and in keeping them until they were served to the plaintiff, then the defendant was not liable.

The oysters, according to the evidence, were purchased about 12 hours before they were served, and while the defendant may have exercised in the selection, purchase, and keeping of the oysters that care which a reasonably prudent man, skilled in the business of selecting and keeping fresh oysters for the table, would have exercised in the selection and keeping of oysters for his own use, nevertheless there was evidence in the case tending to show that such a man, before serving them, would have examined them for the purpose of ascertaining if, when placed on the table or carried to the

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kitchen to be cooked, they were apparently in a fresh and wholesome condition. This duty the charge altogether ignores, and for this reason was vicious and should have been refused.

Moreover, the charge was calculated to mislead the jury in that it failed to define the character of the ordinary care which the law exacts of a restaurant keeper.

"Ordinary care is that care which ordinarily prudent persons would exercise under the same, like, or similar circumstances, and the want of that care is negligence."—6 Words and Phrases, p. 5031, and authorities there cited.

The care which the law exacts of a restaurant keeper is, as we have already said, that degree of care which a man of ordinary prudence, skilled in the art of selecting and preparing food for human consumption, would exercise in selecting and preparing food for his own private use, and not the ordinary care of a man of ordinary prudence who possesses no such knowledge. We do not mean to say that we would reverse this case if the failure to define the ordinary care which the law exacts of a restaurant keeper was the only criticism to which charge 9 could be subjected. *That* defect only gives to the charge a misleading tendency of which it could have been relieved by a counter charge on the part of the plaintiff defining the "ordinary care" which the law exacts in such cases.

This case is to be again tried, however, and we deem it proper to call attention to misleading tendency of the charge for the reason stated.

7. Charges 8, 15, and 17 were at least calculated to mislead the jury, and upon another trial, if the issues and the evidence are the same as they are shown by this record to have been on the former trial, they should be refused.

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8. Charge 20 has a misleading tendency and should have been refused. If the word "before" in said charge is stricken from it and the word "when" is substituted therefor, the defect in the charge will be cured. The word "before," as it appears in the charge, may refer to an inspection of the oysters made several hours before the oysters were prepared for the plaintiff.

9. The trial court refused to permit the plaintiff to testify that in his opinion his sickness was caused by the oysters that were served to him in the defendant's dining car and that after his sickness he could not eat oysters.

We think that it was entirely competent for him to tell his symptoms *after* eating the oysters, but we do not think that the trial court should be put in error for refusing to allow him to give his opinion as to the *cause* of those symptoms. That was a question for the jury.

There is nothing in the case of *Brantley v. State*, 91 Ala. 49, 8 South. 816, *Knowles v. State*, 80 Ala. 9, and *Carl v. State*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; in conflict with these views. In these cases witnesses were permitted to testify that certain drinks did or did not have upon them the same effect as *whisky*. Alcohol has a peculiar wellknown effect upon human beings, and in those cases these witnesses were permitted to testify to "a shorthand rendering of the facts." In the instant case the witness was called upon to give his opinion as to the *cause* of his sickness.

We are satisfied that the plaintiff is of the opinion that the dinner which he ate in the dining car was the cause of his sickness, and we feel confident that he *thinks* that the oysters were the sole cause of it. This being true, the sight of an oyster may cause the plain-

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tiff unpleasantness, but that fact does not tend to show that the oysters actually made the plaintiff sick.

10. The trial court properly excluded the evidence made the basis of the eighth assignment of error. It was for the jury, and not the witness, to say whether spoiled oysters caused the sickness. Dr. Burnham might well have testified that spoiled oysters could have produced the plaintiff's sickness, but it was *not* for him to say that the sickness was caused by spoiled oysters. The question as to whether the oysters were spoiled was a disputed issue of fact.

11. One Whittaker, who testified as a witness for the plaintiff qualified as an expert in the matter of handling, cooking and serving oysters. He testified, among other things, that by the casual examination of an oyster "you can tell whether it is spoiled or not; a perfect oyster is plump and of a bluish cast; a spoiled oyster is very black and the hard substance of a spoiled oyster is very hard and turns a yellow cast. * * * A man drawing oysters from a receptacle with a ladle could tell whether an oyster was in good condition or not if he was accustomed to handling oysters."

The above being the condition of the witness' evidence on the subject under discussion, the court committed no error in excluding from the jury the statement of this witness that the "proper thing to do when taking oysters out of a receptacle to prepare them for food is to take the oysters from the vessel, with a ladle, one by one and examine each before serving." It was not shown that *this* was the custom among well-regulated hotels and restaurants, and the evidence was not given upon a subject peculiarly within the knowledge of an expert. A person who never kept a restaurant and who never served an oyster knows, if he knows a spoiled oyster when he sees it, that, if oysters are taken sep-

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arately from a receptacle and examined separately, a spoiled oyster can be more readily detected than if they are taken en masse from the receptacle.

For the error pointed out the judgment of the court below is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

Clover Creamery Co. v. Diehl.

Injury to Minor.

(Decided May 1, 1913. 63 South. 196.)

1. *Pleading; Amendment; Conditions; Waiver.*—Where the court ordered the amendment to be made in purple ink, but accepted the amendment written in black ink, and refused to strike it out on defendant's motion, it waived the requirement that it should be made in purple ink, as it had authority to do.

2. *Negligence; Machinery Attractive to Children; Complaint.*—A declaration which charged that defendant maintained on its premises machinery, which it negligently left open and unguarded, although it knew that plaintiff, who was a minor two years old, lived upon the premises, was continually playing about the machinery; that the machinery was of such a character as would attract a child of plaintiff's age, and as a proximate result of the negligence of defendant, plaintiff's arm was caught in the cogs of the engine, stated a cause of action for injury to such minor.

3. *Same; Imputed Negligence; Parent.*—The contributory negligence of the father of a three year old child is not available as a defense to an action for injuries to the child caused by the negligence of defendant.

4. *Same; Child of Servant.*—One is liable for injuries to a three year old child caused by the negligence of the manager, even though the manager was the child's father, the child not being responsible for the negligence of its parent.

5. *Damages; Excessive; Loss of Hand.*—A verdict for \$3,500 damages will not be set aside as excessive in an action for injuries to a girl two years old, where such injuries necessitated the amputation of her left arm between the elbow and wrist.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

[Clover Creamery Co. v. Diehl.]

Action by Grace Diehl, a minor, by her next friend, against the Clover Creamery Company for personal injuries. Judgment for the plaintiff in the sum of \$3,500, and defendant appeals. Affirmed.

The amended count 2 is as follows: "Plaintiff who is a minor three years old, and who sues by her next friend and father, J. M. Diehl, claims of defendant, which is a corporation, \$10,000 as damages, for that heretofore, to wit, on the 14th day of April, 1911, the plaintiff was injured through the negligence of defendant in the manner following: The defendant had, at and before the time just stated, on its premises near Mertz Station in Mobile county, Ala., machinery that was attractive to children of plaintiff's age, and was exceedingly dangerous when left unguarded by fence, or in some other way, the machinery being what is known as the gear or cogs operated by a belt connected with the gasoline engine for the purpose of operating a pump for the purpose of pumping the water for defendant's use on said premises, and the plaintiff avers that the defendant then and there negligently permitted said machinery and the said cog to be and remain open and unprotected or unguarded by an inclosure of some character, or in some other manner, although the defendant well knew that plaintiff, who was then and there below the age of discretion, and was then and there residing upon said premises with the permission of defendant, was constantly playing about said premises in close proximity to said machinery; that the said machinery was of such a character that the operation thereof was liable to attract a child of plaintiff's age, the cogs being left in an exposed condition, where the movements thereof could be seen, and that plaintiff was liable to receive serious injuries at some time while said machinery was being operated. And plaintiff avers

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that, as the proximate result of the said negligence of defendant, the plaintiff, while playing on said premises at or near the said machinery was attracted by said machinery, and while standing near said machinery where said cogs were unguarded and uncovered as aforesaid, her dress was caught by said cogs, and her left arm was caught in said cogs being then and there operated, and her left hand was by said cogs seized, and her said hand and arm so crushed and mangled as to necessitate the amputation of said arm a short distance below the elbow thereof. And plaintiff avers that at the same time and in the same manner her said left arm, at or about the shoulder thereof, was terribly mangled and cut, and plaintiff avers that the said injuries caused her great suffering and were of a permanent character, all to her damage in the sum aforesaid."

The demurrers were that the complaint fails to allege that the plaintiff at the time of the injuries was upon the premises of defendant by invitation, expressed or implied, in fact or in law, of the defendant; it does not show that the machinery mentioned therein was so especially and unusually alluring to children as to attract them, nor does it allege facts showing that the machinery was attractive to children, or that defendant had knowledge of the attractiveness of the premises of defendant; it is alleged as a conclusion that the machinery was of a dangerous character; it does not show that the attractiveness of the machinery contributed in any degree to the injury; for aught that appears, the defendant was without knowledge of lack of discretion in the child, or the attractiveness of machinery, or that either or both had anything to do with bringing about the injury; because it does not appear that the attractiveness of the machinery was the proximate result of

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the injury, or that the same was connected causally; and other grounds, not necessary to be here set out.

Plea 2 was as follows: "That at and for a long period, to wit, six months, prior to the time of the happening of the injury to plaintiff, her father had the power, and it was within the scope and line of his employment and duty as manager of defendant, to so conduct and operate its plant as a reasonably prudent man would do, and that the negligence, if any, complained of was that of plaintiff's own father, said J. M. Diehl." The demurrers were, in effect, that the negligence of the father cannot be imputed to plaintiff in this case, or pleaded as a defense. The plea shows that the father was the agent of defendant, and is an effort to excuse defendant's negligence by setting up the negligence of one of its employees.

RICH & HAMILTON, for appellant. The amendment was not such as was authorized by the court, and should have been stricken on motion.—*Keith v. Cliatt*, 59 Ala. 408; *B'ham v. Allen*, 99 Ala. 365; 31 Cyc. 632. Motion to strike was the proper procedure.—*Tenn. Co. v. Danforth*, 112 Ala. 89; *Bird's Case*, 167 Ala. 357. The demurrers to the second count should have been sustained.—*T. C. I. & R. R. Co. v. Smith*, 55 South. 170; *M. & O. v. George*, 94 Ala. 214; *Ensley R. R. Co. v. Chewning*, 93 Ala. 24; *Lacy v. Holmes*, 164 Ala. 96. The tendency in Alabama, and over the country generally is not to extend the turn table doctrine any further.—*A. G. S. v. Croker*, 131 Ala. 585; *Chambers v. R. R. Co.*, 143 Ala. 255; *Sheffield Co. v. Martin*, 161 Ala. 153. In such a case the pleading is to be construed most strongly against the pleader, and the child is regarded as a licensee.—29 Cyc. 449-451; *L. & N. v. Sides*, 129 Ala. 399. The child is in the same category as an adult under such

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circumstances.—*Jefferson v. B'ham*, 116 Ala. 302; *Highlands Co. v. Robbins*, 124 Ala. 113; *A. G. S. v. Moore*, 116 Ala. 642. Therefore, the complaint must show by its statement of facts that the place was attractive to children.—90 N. W. 284; 79 Pac. 955; 100 Ill. App. 452; 29 Cyc. 448; *Cramer v. So. Ry.*, 52 L. R. A. 359; see also 3 L. R. A. (N. S.) 149; 52 N. W. 965. A causal connection must be shown.—*Sloss-Sheffield v. Smith*, 52 South. 38; *Ala. Ry. v. Sides*, 122 Ala. 594; *L. & N. v. VanZant*, 158 Ala. 527. The essence of the negligence is that the machine is attractive, and thereby likely to cause injury by being attractive.—79 N. W. 950; 41 L. R. A. 677; 104 Ill. App. 667, and authorities supra; see generally, 75 N. W. 1038; 44 Ia. 27; 70 N. Y. 126; 35 Minn. 481; 51 Am. Rep. 386. The court erred in sustaining demurrers to plea 2.—*Roller v. Roller*, 68 L. R. A. 893; *McKelvey v. McKelvey*, 64 L. R. A. 991; 68 Miss. 711; 67 Me. 304; 218 U. S. 611; *Strouse v. Leipf*, 101 Ala. 444; *So. Ry. v. Crowder*, 135 Ala. 417. This is not a case of joint tortfeasor, as the plea distinctly states that the whole negligence was that of the servant, and the master is only secondarily liable.—*Mayer v. Thompson*, 104 Ala. 611; s. c. 116 Ala. 634; *Luling v. Shepherd*, 112 Ala. 588; 25 L. R. A. (N. S.) 343; 2 L. R. A. (N. S.) 378; 54 L. R. A. 649; 68 S. E. 404; 16 Am. St. Rep. 248, and note; 94 Fed. 760; 31 N. E. 989. To permit the child to recover against the master would be allowing him to do indirectly what he could not do directly because not allowed to recover against the parent, the one primarily liable in this action.—142 U. S. 18; 98 S. W. 590; 92 N. E. 725, and authorities supra. Where the master is deprived of his remedy over against his servant, he himself is relieved from liability.—75 N. E. 649; 67 N. E. 443; 23 Atl. 44; 24 N. Y. Supp. 603. It must, therefore, be held that the plea was good, and

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that charge 4 requested by defendant should have been given. The court should have excluded the evidence of plaintiff after the case was closed, as there was failure to prove causation, and a defendant cannot be guessed into liability.—*Southworth v. Shea*, 131 Ala. 419; 109 At. St. Rep. 881; 104 N. W. 414; 77 Pac. 515; 73 Pac. 1118; 38 Cyc. 1536; 179 U. S. 658; 21 L. R. A. (N. S.) 115. Counsel discuss exceptions to evidence, but without further citations of authority.

WEBB & MCALPINE, for appellee. The count must be held good on the authority of *A. G. S. v. Crocker*, 131 Ala. 585. The court is clothed with sufficient authority to waive the requirement that an amendment to pleading be in a certain kind of ink, and having overruled motion to strike the amendment in effect waived the requirement. Counsel discuss other assignments of error, but without further citation of authority.

ANDERSON, J.—The amended count 2, the only one upon which the case was tried, was not subject to the defendant's demurrers. It more than met the requirements of the rule as laid down in the case of *A. G. S. R. R. Co. v. Crocker*, 131 Ala. 585, 31 South. 561.

Nor did the trial court err in refusing the motion to strike because the amendment was made in black instead of purple ink. That the amendment should be made in purple ink was a mere direction by the court, which it could and did waive by receiving it in black ink, and in declining to sustain the motion to strike.

This was a suit by an infant three years of age, and the contributory negligence of her parent was not available as a defense. This rule has been so often followed in this state that citation of authority is unnecessary. The trial court properly sustained the plaintiff's demurrer to defendant's plea 2.

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On the other hand, if plea 2 is not to be deemed one of contributory negligence, it is a mere attempt to escape a legal liability for the sole reason that the defendant's negligent manager is the parent of the plaintiff, and which is, in the end, but an effort to make the child responsible for the negligence of the parent, notwithstanding he was the defendant's manager of its plant and works. The cases relied upon by appellant's counsel, to the effect that a child cannot recover from a parent for personal injuries, whether sound or not, are not applicable, in point or by analogy, to the present plea.

The insistence, in most instances, as to the ruling upon the evidence, amounts to no more than a repetition of the assignments of error, but we do not think that the trial court committed reversible error in ruling upon the evidence.

The injury caused the loss of one of the plaintiff's hands and a part of the wrist, and we are not prepared to say that the verdict was excessive.

The judgment of the law and equity court is affirmed. Affirmed.

MCCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

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Damages for Maintaining Nuisance.

(Decided May 15, 1913. Rehearing denied June 19, 1913.
62 South. 777.)

1. *Appeal and Error; Assignments; Bad in Part.*—If a plea, which was filed to two counts of the complaint was good as to either of the counts, an assignment of error that the court erred in overruling demurrer to such plea was not sustained.

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2. *Same*.—Where a plea was interposed to two counts of the complaint, and the plea was established as against either one of the two counts, an assignment that the court erred in refusing to charge that defendants had not proved such plea, cannot be sustained.

3. *Same; Harmless Error; Not Affecting Result*.—Where the affirmative charge was properly given for defendant as to one of the counts, a refusal of a charge requested by plaintiff which was applicable only to that count, was harmless, if erroneous.

4. *Charge of Court; Covered by Those Given*.—The refusal of instructions which were substantially given in other instructions, was not error.

5. *Limitation of Action; Pleading; Avoidance*.—Where the gravamen of a count for damages for a nuisance was the erection of a purification plant, a plea of the one year statute of limitations, was properly pleaded to such count, although the count alleged that plaintiff had been forced to inhale noxious odors during the year last passed, but did not allege the date of the erection of such plant.

6. *Judgment; Conclusiveness; Persons Bound*.—The judgment in an action by a third person for damages for the maintenance of a nuisance was not res judicata that the thing complained of was a nuisance, and was hence, properly excluded from the evidence.

7. *Same*.—A judgment in rem is binding and conclusive upon all the world as to the status of the thing on the theory that the thing is in possession of the court, and that it is the thing itself which is in litigation.

8. *Same; Res Judicata*.—The rule of res judicata,—former recovery—is confined to suits where the parties and the subject matter are the same, and the identical point is in issue, and judgment has been rendered on that point.

9. *Nuisance; What Is*.—An odor disagreeable to ordinary persons, not hurtful to health, is not such a physical annoyance as makes the use of the property producing it a nuisance, unless the discomfort or annoyance produced by it, is of such a degree or extent as to materially interfere with the ordinary comfort of the home existence.

10. *Same; Instructions*.—A charge that the odor that was simply disagreeable to ordinary persons was such a physical annoyance as made the use of the property producing it a nuisance, whether hurtful to health or not, was calculated to cause the jury to reach the conclusion that a nuisance existed, although the disagreeable odor was of short duration, and occurred only once during the year preceding the bringing of the suit.

11. *Same*.—A charge asserting that if defendant participated in the maintenance of the purification plant complained of, during the year next preceding the bringing of the suit, even though such participation was through the lessees, and if foul and offensive odors and smells emanated therefrom during the year, rendering the occupancy of plaintiff's property unpleasant and uncomfortable as a home for him and his family, although this was so only at intervals, the jury should find for plaintiff, properly postulated the essentials to recovery in an action for damages caused by the maintenance of a nuisance.

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APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Action by E. T. Jones against Morris Adler and others for damages for maintaining a nuisance. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The pleadings and facts sufficiently appear. Charge 7 is as follows: "The court charges the jury that if they find from the evidence in this case that defendants in any way participated in the maintenance of the purification plant in question during the year next preceding the filing of this suit, even though it be through defendant's lessees, Lucian and Rose Huey, and further find that foul and offensive odors and smells emanated from the same during the year next preceding the filing of this suit that rendered the occupancy of plaintiff's property unpleasant and uncomfortable as a home for himself and his family, though it may have been so only at intervals, then your verdict should be for the plaintiff." Charge 3 is as follows: "A smell that is simply disagreeable to ordinary persons is such physical annoyance as makes the use of property producing it a nuisance, whether it be hurtful to health in effect or not."

ESTES, JONES & WELSH, for appellant. Demurrers to defendant's 2nd plea should have been sustained.—*City of Birmingham v. Land*, 173 Ala. 538; 13 Enc. P. & P. 214, 215, 224. The court should have allowed plaintiff to introduce the Murphey verdict and judgment against these defendants as *res judicata* on the subject of nuisances.—24 A. & E. Enc. of Law, 780, note 1; *Ib.* 827-8; *Bufford v. Little*, 159 Ala. 303. The court erred in giving the affirmative charge as to the 1st count for defendant.—*City of Birmingham v. Land*,

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supra; *Adler v. Pruitt*, 53 South. 315. The court should have given the charge asserting that defendant had not proven their 2nd plea.—Authorities *supra*. The court should have given charge 2.—Authorities *supra*. Charge 3 was a proper charge and should have been given.—*Hundley v. Harrison*, 123 Ala. 297; *Wood on Nuisances* 568. Charge 7 should have been given.—*Grady v. Walsner*, 46 Ala. 381, and other authorities *supra*.

PERCY, BENNERS & BURR, for appellee. The error relative to overruling demurrers to plea 2 cannot be sustained, as it is joint and the plea was certainly good as to one count.—*Thompson v. N. C. & St. L.*, 160 Ala. 590. This is also true as to the error assigned relative to requested charge 2. The judgment in favor of Murphy was neither *res judicata*, as to the nuisance, or otherwise.—2 Smith's Leading Cases, 734; *McCall v. Jones*, 72 Ala. 368; *Ryan v. Young*, 147 Ala. 660. There was no error in refusing charge 3.—*Adler v. Pruitt*, 169 Ala. 213; *Murkison v. Adler*, 59 South. 505. Charge 7 was argumentative and properly refused.—*Moss v. Moseley*, 148 Ala. 168; *Dorough v. Harrington*, 148 Ala. 305.

McCLELLAN, J. This is an action for damages caused by an alleged nuisance.

The facts disclose that what is termed the "purification plant" was erected by legislative authority for the purpose of purifying sewage of certain places conveyed through a trunk-line sewer, which was also built by legislative authority. It also appears from the evidence that appellees, in a duly authorized and legal manner, entered into a contract, the terms of which fully appear in the report of the case of *Adler & Co. v.*

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Pruitt, 169 Ala. 213, 53 South, 315, 32 L. R. A. (N. S.) 889, with the proper authorities by which they became entitled to, and did, operate said plant; and that by a proper sublease they authorized other parties to operate said plant, which the sublessees were doing at the time this action was instituted.

The complaint consists of two counts; for the first declaring upon the "purification plant" as creating a nuisance, and the second declaring upon its maintenance, equivalent to operation, as such nuisance. The averments of each count are that offensive odors, etc., emanate from said plant, as maintained, which materially or substantially affect the comfort of plaintiff's home, which is situated near thereto. Defendants interposed three separate pleas to each of the counts of the complaint. With plea 3 we are not concerned, as appellant's demurrer thereto was sustained. Plea 1 was the general issue, and plea 2 was the statute of limitations of one year. To the latter plea appellant filed one set of demurrers, making the same applicable to each count. The demurrers, as thus interposed, were overruled by the court.

The first assignment of error reads as follows: "The city court committed manifest error in overruling plaintiff's demurrers to the defendant's second plea." This is a general assignment embracing demurrers interposed to plea 2 as an answer to count 1 and to count 2. If the demurrers interposed to either plea are not well taken, then this assignment fails. *Thompson v. N. C. & St. L. Ry.*, 160 Ala. 590, 49 South. 340; *Craig & Co. v. Pierson Lumber Co.*, 169 Ala. 548, 53 South. 803; *Aetna Life Insurance Co. v. Lasseter*, 153 Ala. 630, 45 South. 166, 15 L. R. A. (N. S.) 252.

There was no error in overruling the demurrers to plea 2 as applicable to count 1 of the complaint, since

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the gravamen of said count is that the "nuisance consists of a plant, known as the purification plant," and contains no averment as to the date of its erection or creation, though there is an averment that plaintiff has been forced to inhale noxious odors for "one year last past," which is not the nuisance of which complaint is made. This assignment of error is not well taken.

The third assignment of error, which is the refusal of the trial court to charge, as requested by plaintiff, that the defendants had not proven their second plea, is in the same condition as the first assignment of error—that is, the charge requested goes to plea 2 as applicable to both counts of the complaint—and hence, if not well taken as to either count, the trial court cannot be put in error. The evidence shows that the plant was erected in the year 1905, more than a year before the bringing of this suit; therefore, as to count 1 the plea was proven. In this connection it may be said the affirmative charge given at the request of the defendant as to count 1 was proper.

Assignment of error No. 2 is that the court erred in sustaining the objections of defendants to the offer of plaintiff to prove by parol that one Murphy had recovered a judgment for \$2,300 as damages against these defendants in a court of competent jurisdiction for the maintenance of the same plant as a nuisance; the objections interposed being that the same was incompetent, immaterial, illegal, and irrelevant. The purpose of this was, as stated by appellant, to show that a court of competent jurisdiction had, by its judgment, fixed the status of the said plant or its operation. In our opinion this could not be done. This suit of Murphy was a personal action by him for damages just as is the instant action, the Adlers being defendants in each, but the plaintiffs being different persons, without connection,

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either directly or by privity, with each other. It is true a judgment in rem is binding and conclusive upon all the world as to the status of the thing, but this is on the theory that the thing is in possession of the court, and it is the thing itself which is in litigation. Here the effort is to recover damages in a personal action, and the res is not in litigation, except as to whether it was a nuisance at and during the particular time of which complaint is made. In this attitude the doctrine announced in the leading case of the *Duchess of Kingston*, 2 Smith's Leading Cases (8th Ed.) 734, is applicable, where it is said the following is deducible from the cases as to giving in evidence of judgments: "First, that the judgment of a court of competent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence conclusive between the *same parties* upon the matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the *same parties*, coming incidentally in question in another court, for a different purpose." Italics ours. Or, as said by this court in *McCall v. Jones*, 72 Ala. 368, on page 371 of the opinion: "The rule of res adjudicata or former recovery, is confined to those cases where the *parties to the two suits are the same*, the subject-matter the same, the identical point is directly in issue, and the judgment has been rendered on that point." See, also, 3 Mayf. Dig. 845.

The principle here sought to be applied by the appellant was decided against him in the case of *Ryan v. Young*, 147 Ala. 660, 41 South. 954, where it was sought to introduce in evidence the record of a chancery case for the purpose of showing that "the validity vel non of plaintiff's mortgage was res adjudicata, and therefore that the plaintiff was precluded from maintaining the

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suit." Upon the question thus presented, this court, after quoting from *McCall v. Jones*, *supra*, said: "Premitting discussion of other ingredients, we notice that an essential ingredient of *res adjudicata* was lacking in the proceedings offered, the defendant Lovin was not a party to the suit in chancery. The proceedings were offered in behalf of all of the defendants without any offer to limit the effect of the evidence to defendants Ryan and Brock, and, even if the proceedings could be held competent as to them, yet not being competent as to Lovin, the court did not err in not allowing them in evidence." Bearing on the same question is the case of *Fidelity & Deposit Co. of Maryland v. Robertson*, 136 Ala. 379, 34 South. 933.

Refused charge 6, requested by plaintiff, was, if error, without injury to him, as it was only applicable to count 1 of the complaint, as to which we have held the affirmative charge, requested by defendants, was properly given.

Refused charge 2, the basis of assignment of error 5, was substantially given in unnumbered charge found at bottom of page 17 of the transcript; hence, its refusal was not error.

Refused charge 3, requested by appellant, was not error, for that its tendency is to mislead the jury to the conclusion that a nuisance might be created, though such disagreeable smell was of short duration, and was wafted to the olfactory organs of defendant only once in a twelve month. In addition, it does not accurately state the law. The annoyance or discomfort caused must be of "such degree or extent as to materially interfere with the ordinary comfort of home existence."—*English v. Progress Electric Light & Motor Co.*, 95 Ala. 259, 10 South. 134; *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 South. 315, 32 L. R. A. (N. S.) 1889; *Murkeson v.*

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Adler, 178 Ala. 622, 59 South. 505. The case of *Hundley v. Harrison*, 123 Ala. 297, 26 South. 294, is not in conflict with this, as it quotes with approval *English's Case*, *supra*.

Charge 7, requested by plaintiff and refused by the court, should have been given. It accurately postulates the conditions essential to a recovery.—*English's Case*, *supra*; *Hunley's Case*, *supra*. The writer desires to add these expressions of individual judgment:

As appears, the appeal is treated in this opinion upon the theory thought to be sustained in *Mayor & Aldermen, etc. v. Land*, 137 Ala. 538, 34 South. 613, that, notwithstanding the legislative authorization of the installation and operation of the purification plant, the operation thereof, if attended with injury to neighboring lands or their use, was a nuisance unless the condemnation provided by the authorizing act was availed of. There is no suggestion in this record that negligence affected the construction or maintenance and operation of this purification plant. So the writer is inclined to the view that the plaintiff's sole remedy (if he has been damaged in consequence of the plant's operation) is under Constitution (section 235). This view would seem to logically follow from the generally accepted fact that the doing alone of that which the law authorizes—grants the power to do—cannot be a public nuisance. This principle, and the necessary legal consequences flowing therefrom, may be found stated and illustrated in these, among other, cases:—*H. A. & B. R. Co. v. Matthews*, 99 Ala. 24, 10 South. 267, 14 L. R. A. 462; *Crofford v. A. B. & A. R. R. Co.*, 158 Ala. 288, 48 South. 366; *Arndt v. Cullman*, 132 Ala. 540, 31 South. 478, 90 Am. St. Rep. 922. If the permanent, non-negligently installed and operated purification plant is denominated a nuisance, then, manifestly, equity could

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be invoked to abate it. If that could be done, the result would be that a process—of a public nature regarded as essential to the preservation of health in a populous section—expressly authorized by law would be defeated and annulled by judicial pronouncement. “Damages which can be assessed in condemnation proceedings can be assessed just as well in an ordinary action at law.”—*Highland Ave. & B. R. Co. v. Matthews*, 99 Ala. 29, 30, 10 South. 269, 14 L. R. A. 462.

For the error pointed out the cause is reversed and remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., and MAYFIELD, J., not sitting.

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Damage for Injury by Explosion.

(Decided June 30, 1913. 63 South. 67.)

1. *Explosives; Blasting; Injury.*—Where a plaintiff is lawfully on defendant's premises, and is injured by blasting, defendant's liability depends upon some proximate negligence on his part.

2. *Same; Complaint.*—A count which charged that the servants of defendant, acting within the line and scope of their authority, and knowing that the blasting would frighten and endanger the plaintiff and his family, and damage plaintiff's property by casting stones thereon, wantonly caused rocks and stones to be cast upon plaintiff's premises, sufficiently charged a trespass in an action for injuries by blasting.

3. *Same; Damages; Jury Question.*—Although a plaintiff in an action for trespass by blasting fails to prove aggravation entitling him to such damages, yet if plaintiff was entitled to recover, he would still be entitled to compensatory or nominal damages, and hence, defendant was not entitled to have the verdict directed for him.

4. *Trespass; Pleading; Wanton.*—When used in an action for trespass the word “wanton” is not governed by the same rules as when used in an action for negligence, but means simply an invasion of the premises of plaintiff with knowledge of the violation of plaintiff's rights, and of injuries thereby caused.

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5. *Same; Damages.*—Exemplary damages may be awarded by the jury where a trespass is committed under circumstances of aggravation.

6. *Same; Knowledge of Master; Liability.*—Where fragments of rock are thrown upon adjoining premises as the result of blasting being carried on by the servants of a defendant, which were continued after notice to defendant of the injury thereby caused, it was at least a question for the jury whether defendant instigated the trespass, if it was not shown as a matter of law.

7. *Master and Servant; Liability to Third Person; Trespass.*—A master is liable for the trespasses of his servant which are the natural or probable result of his orders, or which he ratifies.

8. *Adjoining Landowners; Injuries by Blasting.*—Where blasting operations cause rock and other debris to be thrown upon the adjoining premises, it is a trespass for which the one blasting is liable, without regard to any negligence in the manner of blasting, unless the one blasting has acquired an express or implied easement against the other's premises; in the latter event, the one blasting is liable only for negligence.

9. *Same.*—There is no liability to adjoining landowners for the ordinary discomforts and injurious effects of lawful blasting operations on defendant's own premises, not constituting a nuisance, except for negligence in the manner of carrying on such blasting operations.

CERTIORARI to Court of Appeals.

Certiorari by the Birmingham Realty Company to review the opinion in the Court of Appeals in the case of the Birmingham Realty Company against R. E. Thomason (8 Ala. App. 535, 63 South. 65). Writ denied.

The Court of Appeals affirmed the judgment of the trial court in this case, and the appellant seeks by writ of certiorari to review that decision. It is complained that under the decisions of this court the Court of Appeals erred in holding the overruling of defendant's demurrer to the second count of the complaint to be without injury, and also for its failure to give the general affirmative charge for defendant.

The second count is as follows, after alleging the residence of plaintiff and his family, and the location of the garden and out-buildings on the premises: "That the defendant, through its servants and agents, acting

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within the line and scope of their authority, under their employment by defendant, beginning on, to wit, the 1st day of August, 1907, and on divers other dates since said date, up to and including the present time, has been engaged in blasting stone and other substance near said premises, *said servants or agents of plaintiff so acting within the line and scope of their authority under their said employment, knowing that the blasting of rock, stone, and other substances near said premises as they were doing would greatly frighten plaintiff and endanger his life, and frighten and endanger the lives of his family, would damage his live stock, gardens, premises, yards, houses, and poultry by casting on plaintiff's said dwelling house, outhouse, stable, lot garden, and yard, so located on said premises, said rock, stone, and other substances, wantonly caused said rock, stone, or other substances to be cast upon plaintiff's dwelling house, outhouse, stable and lot, garden and yard, so located on said premises, and as a proximate consequence thereof greatly frightening and endangering plaintiff's life as well as plaintiff's family, greatly damaging his live stock, yard, house, premises, and poultry, all to plaintiff's damage,"* etc. (The portion inserted by amendment is underscored.)

LONDON & FITTS, for appellant. The rule of presumption in blasting cases is fully stated in 1 Thomp. on Neg. sec. 770, and *Sheffield S. & I. Co. v. Salser*, 158 Ala. 515. This presumption is rebuttable in the sense that it entirely disappears when the countervailing proof is clear and free from conflict.—*R. R. Co. v. Sanders*, 145 Ala. 449; *C., etc. v. Vanderhump*, 147 Ala. 546; *Seales v. Edmundson*, 71 Ala. 509. No negligence is averred and none is presumed, the liability existing wholly irrespective of want of care in the blasting under the first

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count.—Authorities supra. Wanton wrong is legal malice.—*R. R. Co. v. Quigley*, 21 How. 214; *Leinkauf v. Morris*, 65 Ala. 176; *Wilkerson v. Searcy*, 71 Ala. 176; *H. A. & B. R. R. Co. v. Robinson*, 125 Ala. 483. The only question is “are you damaged, and how much?” The knowledge which entered into wantonness is never inferred from mere opportunity to know. Actual knowledge, not notice, is the sine qua non.—*So. Ry. v. Bunt*, 131 Ala. 591; *C. of Ga. v. Freeman*, 134 Ala. 354; *B. R. L. & P. Co. v. Brown*, 150 Ala. 322. The second count was a count in trespass and not in case.—*City Del. Co. v. Henry*, 139 Ala. 161; *R. R. Co. v. Freeman*, 140 Ala. 581; *Freeman v. R. R. Co.*, 154 Ala. 619; *Bessemer v. Doak*, 162 Ala. 168. So unless the second count alleges corporate wantonness, it alleges no wantonness at all.—*Bir. Co. v. Parker*, 156 Ala. 251.

FRANK S. WHITE & SONS, for appellee. The second count was not subject to the criticisms indulged but it properly charged wantonness.—*M. & O. R. R. Co. v. George*, 94 Ala. 214; *Armstrong's Case*, 125 Ala.; *B. R. L. & P. Co. v. Lee*, 153 Ala. 70; *Same v. Wise*, 149 Ala. 492; *Same v. Selhorst*, 165 Ala. 475; *Same v. Baker*, 132 Ala. 572. Under the issues made, the age of the children was admissible in evidence. The defendant was not entitled to the general charge.—*Salser v. Sloss-Sheffield Co.*, 158 Ala. 518; *Bessemer C. & I. Co. v. Doak*, 152 Ala. 165; 17 L. R. A. 220. Defendant was not entitled only to recover damages done his property, but also such other damages as naturally flowed from the wrong done.—*Dowdell v. King*, 97 Ala. 635; 86 Ala. 587; 58 Ala. 211; 24 Ala. 130. The plaintiff was certainly entitled to nominal damages which robbed defendant of the right to the affirmative charge.—*W. U. Co. v. Dickens*, 148 Ala. 485. The evidence show-

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ed a trespass and a nuisance.—*Bir. O. & M. Co. v. Groover*, 159 Ala. 276. Defendant was not entitled to the affirmative charge as to the second count.—*Hix v. Swift Creek Co.*, 133 Ala. 425; *L. & N. v. Smith*, 141 Ala. 342; *B. R. L. & P. Co. v. Nolan*, 134 Ala. 322; *A. G. S. v. Sellers*, 93 Ala.

SOMERVILLE, J.—The law of liability for injury resulting from blasting on one's own premises is well settled.

1. Where the plaintiff is injured while lawfully on the defendant's premises, liability depends upon some proximate negligence on the part of the defendant.—*Sloss-Sheffield, etc., Co. v. Salser*, 158 Ala. 511, 48 South. 374; *Birmingham, O. & M. Co. v. Grover*, 159 Ala. 276, 48 South. 682.

2. For the ordinary discomforts and injurious effects attendant upon the defendant's lawful operations on his own premises, not constituting a legal nuisance, there is no liability to an adjoining or neighboring proprietor except for some proximate negligence in the mode or circumstances of such operations.—*Williams v. Gibson*, 84 Ala. 228, 233, 4 South. 350, 5 Am. St. Rep. 368.

3. Where the defendant throws rock or other debris upon the premises of an adjoining or neighboring proprietor, this is a direct invasion and a trespass for which the defendant is absolutely liable, regardless or any considerations of prudence or negligence in the mode or circumstances of the blasting.—*Bessemer, etc., Co. v. Doak*, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 389; *Sloss-Sheffield, etc., Co. v. Salser*, 158 Ala. 511, 48 South. 374; *Birmingham O. & M. Co. v. Grover*, 159 Ala. 276, 48 South. 682; 38 Cyc. 997; 1 Thomp. Neg. (2d Ed.) § 764.

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4. This general rule of liability is qualified by the principle that, where the defendant has by law or contract acquired an easement as against the plaintiff's premises, which expressly or impliedly authorizes the operation of blasting, either directly or as a reasonably necessary incident to some other lawful purpose, liability arises only as the result of some proximate negligence on the part of the defendant.—*Wilkins v. M. C. Slate Co.*, 96 Me. 385, 52 Atl. 755; *Blackwell v. L. & D. R. R. Co.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786; 27 Cyc. 784, b; 1 Thomp. Neg. § 766. See, also, *Williams v. Gibson*, 84 Ala. 228, 232, 4 South. 350, 5 Am. St. Rep. 368; *Hooper v. Dora Coal Mining Co.*, 95 Ala. 235, 10 South. 652; *L. & N. R. R. Co. v. Higginbotham*, 153 Ala. 334, 344, 44 South. 872.

In the instant case the complaint avers and the evidence shows a direct invasion of plaintiff's premises, occupied by himself and family, by blasting done on defendant's premises, whereby fragments of rock of a dangerous size were hurled against the dwelling house and about the curtilage.

Defendant's insistence is that the Court of Appeals has overruled the decisions of this court in several particulars: (1) In construing the second count of the complaint as one in case; (2) in holding that defendant corporation is liable *in trespass* for the alleged acts of its servants; and (3) that wantonness is not shown and cannot be inferred from the facts in evidence. These theories of the case are presented by defendant's request in writing for the general affirmative charge on the second count, refused by the trial court.

Conceding, without deciding, that the second count is for a trespass by the defendant corporation itself, within the rule of *City Delivery Co. v. Henry*, 139 Ala. 166,

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34 South. 389, we find in the action of the Court of Appeals nothing not in harmony with the decisions of this court or with the general principles of the law. "A master is liable if a trespass is the natural and probable result of orders given by him to his servant, or if he ratifies a trespass committed by his servant or agent."—38 Cyc. 1040.

It cannot be declared, as matter of law, that the hurling of these fragments of rock upon plaintiff's premises was not the natural and probable result of defendant's blasting carried on in close proximity thereto. And certainly, if it was continued by the company after knowledge of its injurious results through notice to its general manager, the question of the company's direct instigation of the trespasses complained of was at least a question for the jury, if it was not foreclosed against the company as a matter of law.

When a trespass is committed under circumstances of aggravation, exemplary damages may be awarded by the jury. "Exemplary damages may be given when the act was oppressive, or when the act was committed with violence, or rudely, or with excessive force, or under circumstances of insult and outrage, * * * or in known violation of the law, or forcibly and against protest."—38 Cyc. 1144-1146, and cases cited.

The word "wanton," when used in a trespass complaint to characterize conduct set up by way of aggravation merely, is not governed by the rules of pleading applied to the same word when used in negligence counts. As here used, we think it imports no more than that the rocks were thrown on plaintiff's premises with a knowledge of the violation thereby of plaintiff's rights and of the injurious results therefrom, and there was evidence to support that charge.

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But, even if the charge of aggravation failed of proof, plaintiff would still have been entitled under this count to recover compensatory or nominal damages, and defendant's requested instruction should have gone to the elimination of exemplary damages, and not to a denial of any recovery at all.

The grounds of demurrer assigned to the second count were upon the theory, now denied, that the count is in case, and that it alleges that defendant's *servants* caused the rocks to be thrown. But, overlooking this infirmity of the demurrer, the count sufficiently charges a trespass, and the demurrer was properly overruled.

We find nothing in the decision of the court of appeals which ought to be corrected here, and the writ of certiorari will be denied.

Writ denied. All the Justices concur, except DE GRAFFENRIED, J., not sitting.

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Damages for Mistake in Message.

(Decided June 30, 1913. 63 South. 88.)

Appeal and Error; Review; Decisions of Intermediate Court; Facts.—The decision of the Court of Appeals examined and held to amount to no more than the finding of the existence of certain facts or inferences to be drawn therefrom; which being true, this court will not review or revise the holding of said court, as it does not involve error as to question of law.

CERTIORARI to Court of Appeals.

The Jackson Lumber Company brought its action against the Western Union Telegraph Company, for damages for a mistake in the delivery of a message, and judgment having been rendered for defendant, plaintiff appealed to the Court of Appeals where the judg-

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ment of the trial court was reversed and remanded. The defendant seeks by certiorari to review the judgment of the Court of Appeals (7 Ala. App. 644; 62 South. 266). Writ denied.

RUSHTON, WILLIAMS & CRENSHAW, for appellant. The telegraph company was not the agent of the sender in such sort that the sender is bound by the terms of the telegram as delivered to the addressee, and hence, the sender was under no obligation to pay the sendee for the pulleys delivered.—*W. U. T. Co. v. Anniston C. Co.*, 59 South. 757; 10 Am. St. Rep. 699; 48 Am. St. Rep. 605; 6 Am. St. Rep. 557; 10 A. & E. Corp. Cases, 606. The sender could not by accepting the pulleys after knowledge of the mistake create a right of action on its part against the telegraph company.—*W. U. T. Co. v. Anniston C. Co.*, *supra*. The telegraph company is not liable to the sender by reason of the assignment of the claim held by the sendee.—*Jones v. Watkins*, 1 Stew. 81; *Rutherford v. McIvor*, 21 Ala. 750; *Gwin v. Hamilton*, 29 Ala. 233; *Cahaba Co. v. Burnett*, 34 Ala. 400; *Merrill v. Brantley*, 123 Ala. 537. The assignee of a chose in action acquires no greater right than the assignor had at the time of the assignment.—*Gayle v. Penson*, 3 Ala. 234; *Harrison v. Marshall*, 6 Port. 65; *Citizens Bank v. Haas*, 157 Ala. 609; Page on Contracts, sec. 1269. The claim of the Fairbanks Company had been paid, and its debt extinguished prior to the assignment; hence, at the time of the assignment it had no claim to convey.—*Harrison v. Hir*, 1 Port. 423; *Webster v. Wyser*, 1 Stew. 184; *Tradesman Bank v. Sheffield Co.*, 137 Ala. 547; 23 L. R. A. 120.

W. O. MULKEY, contra. The matters sought to be reviewed amounted to no more than the finding of the existence of certain facts or inferences to be drawn

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therefrom, and hence, this court will not review the judgment of the Court of Appeals, as the rule has been established otherwise.—*Ex parte L. & N. R. R. Co.*, 58 South. 315; *Livingston v. State*, 61 South. 54; *Ex parte Williams*, 62 South. 63.

ANDERSON, J.—It may be conceded, as contended by petitioner's counsel, that the assignee of a chose in action acquires no greater rights than the assignor had at the time of the assignment, and that the voluntary payment and discharge of a debt operates as its extinguishment; yet we do not construe the opinion of the Court of Appeals, in this case, as being in conflict with these well known principles. As we understand said holding, it was to the effect that, notwithstanding the date of the assignment by the Fairbanks Company to the Jackson Lumber Company was subsequent to the payment to the former for the pulley, there were facts and circumstances attending the negotiation affording an inference that the payment was not intended to operate as an absolute discharge of the demand, but that it was intended as a purchase or assignment of said demand. This holding amounted to no more than a finding by the Court of Appeals of the existence of certain facts or inferences to be drawn therefrom, and is not, therefore, a question for review by this court.

We have repeatedly held that this court will not review or revise the holding of the Court of Appeals, except for error as to a question of law, and not upon a finding or conclusion as to facts, or in the application of the facts to the law.—*Livingston v. State*, 181 Ala. 94, 61 South. 998; *Savannah Williams v. State*, 182 Ala. 34, 62 South. 63.

The application for the writ of certiorari is denied. All the Justices concur.

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Western Union Telegraph Co. v. Dunlap.

Damages for Delay in Delivery of Message.

Telegraphs and Telephones; Message; Delivery; Damages.—Where it appeared that the sendee arrived before the funeral of her father, and that she could not have arrived before his death had there been no delay in the delivery of the message, and no wantonness was shown, a verdict for \$700 for delay in delivering a telegram announcing that the sendee's father was near death, was excessive.

APPEAL from Shelby Circuit Court.

Heard before Hon. HUGH D. MERRILL.

Action by Laura Dunlap against the Western Union Telegraph Company for damages for delay in delivery of telegram. Judgment for plaintiff in the sum of \$700, and defendant appeals. Reversed and remanded because of excessive verdict, unless remittitur is entered, which being done, the cause is affirmed.

CAMPBELL & JOHNSON, and BROWN & KOENIG, for appellant. Counsel discuss the action of the court on the pleading, and in the refusal of charges requested, citing authorities in support of their contention, but in view of the opinion it is not deemed necessary to here set them out. They further insist that the verdict was excessive in view of the fact that no wantonness was charged or shown.—*W. U. T. Co. v. North*, 58 South. 299; *Florence Co. v. Fields*, 104 Ala. 480; 10 Am. St. Rep. 367; 28 Am. Rep. 338; 28 Am. Rep. 582; 14 S. W. 566.

RIDDLE, ELLIS, RIDDLE & PRUET, for appellee. The verdict was not excessive, as mental pain and anguish are elements of actual damage in cases of this character.—*W. U. T. Co. v. Hale*, 143 Ala. 586; *W. U. T.*

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Oo. v. Seay, 115 Ala. 670; *C. of Ga. v. White*, 56 South. 574. Counsel discuss other assignments of error, which are not necessary to be here set out.

MAYFIELD, J.—This action is in case, to recover damages on account of delay in the delivery of the following telegraphic message: "Jemison, Ala. Laura Dunlap, Wilsonville, Ala. Come at once for your father is almost dead. Ivan Langston." The message was received at the sending office between 8 and 9 a. m., April 16, 1912, and reached the delivering office at 9 a. m., but was not delivered to the sendee until 1:20 or 1:30 p. m. of that day. The only possible negligence was this delay. In consequence thereof it was a question for the jury, under the proof, to say whether or not plaintiff would have left Wilsonville earlier than she did, had she received the message promptly, as there were one or two trains leaving that station, that day, on either of which plaintiff could have taken earlier passage to her destination, which was Jemison, Ala. Plaintiff left Wilsonville on the 4:30 p. m. train, but it was 30 minutes late, and she therefore reached Calera after the 5:15 train on the Louisville & Nashville Railroad had left that station for Jemison; and she spent the night at Calera and took the morning train for Jemison, arriving at Jemison at 7:56 a. m.

The plaintiff could have gotten a conveyance at Calera, and have driven to Jemison in about an hour and a half, but instead she spent the night at Calera, paying a dollar for her lodging. When she reached Jemison, or her father's home, which was about a mile and a half from Jemison, she learned that her father had died about 10 o'clock the day before. She attended the funeral that afternoon.

It therefore conclusively appears that she could not have reached her father before his death, even had the

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message been delivered promptly; and, as she was in ample time to attend the funeral, these two elements of damages, usual in such cases, were wanting.

There was a verdict and judgment, however, for \$700. The trial court declined to set this verdict aside on the defendant's motion for a new trial, based on the ground, among others, that the verdict was excessive.

We find no error in the trial court's refusing any one of the defendant's requested charges. They were each in effect the affirmative charge for the defendant, or to the effect that the plaintiff could recover only the cost of sending the message, or that plaintiff could not recover as for mental anguish.

While the amount of plaintiff's damages was, under the evidence, a question for the jury, we are decidedly of the opinion that the verdict was so excessive as to require the trial court to set it aside and award the defendant a new trial. There was not any count, nor even a claim, that there was any wantonness as to the delay in delivery of the message; and we see no basis in, or tendency of, the evidence to support a verdict for the amount awarded here. While, as before stated, the amount of the damages in this case is for the jury to say, yet we will say, in the language of another, that it is for another jury, and not this one, unless the plaintiff (appellee here), by virtue of the act of the Legislature approved April 21, 1911 (Acts 1911, p. 587), shall within 30 days from the date of this decree, remit \$550 of the verdict and judgment recovered, and agree to accept a judgment for \$150, and the defendant (appellant here) shall agree to accept such reduction of the judgment appealed from, in which event the judgment appealed from will be so corrected as to amount and, as corrected, affirmed. On the other hand, if such remittance be not made by the plaintiff within the time indi-

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cated, and so accepted by the defendant, then a judgment will be here entered reversing the judgment of the lower court and remanding the cause for a new trial.—*Central of Georgia Ry. Co. v. Stevenson*, 3 Ala. App. 313, 57 South. 494; *Western Union Telegraph Co. v. North*, 177 Ala. 319, 58 South. 299. All the Justices concur, except DOWDELL, C. J., not sitting.

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Damages for Delay in Delivery of Telegram.

(Decided April 17, 1913. 62 South. 821.)

1. *Telegraphs and Telephones; Messages; Collection of Charges; Agency.*—A messenger of a telegraph company delivering messages received at the terminal office is the agent of the company and not of the sendee, and a payment of the charges to such messenger is a payment to the company.

2. *Same; Delay; Payment of Charges; Effect.*—The right of the sendee to recover damages for negligent delay in delivery of telegraph message is not affected by the fact that the charges thereon were paid by her husband, who was present when the message was delivered, although the husband did not intend to make the wife refund the money.

3. *Same; Jury Question.*—Under the evidence in this case it is a question for the jury whether the telegraph company was guilty of unreasonable delay in the delivery of the message after notice that special delivery charges would be paid.

4. *Same.*—Where a service message demanding special delivery charges is sent, and an answer guaranteeing the charges is received by the company, the question of whether the telegraph company performed its duty in delivering the message is for the jury.

5. *Appeal and Error; Harmless Error; Charges.*—Where a count in a complaint is withdrawn by the plaintiff before the jury retires, any error in refusing to charge the jury that they could not find for plaintiff under that count, is harmless.

APPEAL from Morgan Law and Equity Court.

Heard before HON. THOMAS W. WERT.

Action by Lula W. Boteler against the Western Union Telegraph Company for delay in delivery of a

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message on which special delivery charges had been paid. Judgment for plaintiff and defendant appeals. Affirmed.

O. KYLE, and CAMPBELL & JOHNSON, for appellant. So far as the question of technical liability is concerned, this case cannot be distinguished on the facts from the cases of *W. U. T. Co. v. Brown*, 59 South. 329; *Same v. Adams*, 154 Ala. 657. On these authorities, the affirmative charges should have been given for defendant as requested.—*Heathcoat v. W. U. T. Co.*, 156 Ala. 339; 12 Enc. of Evid. 419; 77 Wis. 174; 68 Am. St. Rep. 316; 12 Am. St. Rep. 317; 27 Am. St. Rep. 487. The action was in tort, and plaintiff has not proven any damages in person or estate.—*W. U. T. Co. v. Jackson*, 163 Ala. 9; *W. U. T. Co. v. Brown*, *supra*. Counsel discuss the other assignments of error, but without further citation of authority.

CALLAHAN & HARRIS, for appellee. Having undertaken the duty of delivering the telegram for reward, whether primarily that duty rested on the company or not, it must have acted diligently.—*W. U. T. Co. v. Wilson*, 93 Ala. 32; 43 L. R. A. 218; Thompson on Electricity, sec. 300; *Hood v. Telegraph Co.*, 47 S. E. 607. The fact that the husband paid the charges on the message for his wife did not affect her right to recover, although he may not have intended that she should repay it.—*W. U. T. Co. v. Merrill*, 144 Ala. 623; *Same v. Krichbaum*, 42 South. 16. Under the facts in this case the question was a jury one.—37 Cyc. 1668 and 1728.

DE GRAFFENRIED, J.—When a messenger boy of a telegraph company, as its delivering agent, brings me a telegram, that messenger boy is, in and about the de-

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livery of that telegram, the telegraph company itself. When I receipt to him for that telegram I receipt to the telegraph company for the telegram. If that telegram is sent to me "collect," or if there are charges on that telegram to be paid when the telegram is delivered to me, and I pay those charges to the messenger boy, I make the payment through him to the telegraph company. The messenger boy is the *messenger boy* of the *telegraph company*, not *my messenger boy*, and if it should turn out that the money I pay the messenger is the amount which the telegraph company owed the messenger boy for bringing me the telegram, the payment by me of the money to the messenger boy would still be a payment by me to the telegraph company of a debt which I owed it for delivering to me the telegram through the messenger boy. In such a case, as the receipt by me of the telegram from the messenger boy and the payment by me of the charges to the messenger boy were contemporaneous—parts of one transaction—the payment of the money would, in law, have the same effect as if the money had been paid before the telegram was delivered. In such a case, if the *charge* of the telegraph company is a lawful charge, I am *not entitled to receive* and the telegraph company is under *no legal obligation to deliver the telegram to me*, until I pay such legal charges. In such a case the money paid by me or for me to the telegraph company is, *as between me and the telegraph company, my money*. As the telegram is addressed to me, it is *my telegram*, and if it is *delivered* to me upon the *payment of the legal charges*, it does not matter out of *whose pocket* the money comes to pay the charges on the telegram, provided, of course, it is honest—not stolen—money. It is my debt that is paid—not the debt of some other person—and as between me and *my creditor*, the debt being

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extinguished, the money with which the debt is paid is my money, *a part of my estate*.

In the instant case a telegram, upon which there were certain messenger charges to be paid when the telegram was delivered, was delivered to the plaintiff. The telegram was addressed to the plaintiff, was *her telegram*, and the charges represented a lawful charge of the telegraph company against the plaintiff for delivering to her the telegram.

The husband of the plaintiff, who was present when the telegram was delivered, paid the charges to the messenger out of his own money, without intending to make his wife refund it. The telegraph company now contends that the plaintiff cannot recover damages suffered by her on account of its negligent delay in delivering the telegram because the telegram *cost her nothing*, because, forsooth, she was not damaged *in her estate*. As between the plaintiff and the telegraph company, the money was the plaintiff's money, and there is nothing in *this* contention of the defendant.

1. It appears from the evidence that Lula A. Boteler lives six miles from a post office known as Danville. Her post office is Danville, which is an unincorporated village several miles from Hartselle. Hartselle and Decatur seem to be the nearest railroad stations to Danville, and between the unincorporated village of Danville and Hartselle there was, at one time, a connection by telephone, which telephone was used by the Western Union Telegraph Company for the purpose of transmitting telegrams which were received by it for transmission to Danville. Mrs. Boteler is the wife of J. M. Boteler, who is over 60 years of age, and Boteler testified that he is the only J. M. Boteler who lives near Danville, and that he has resided in that community for 50 years. In other words, the evidence tends to show

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that Mr. Boteler was known by all the residents of Danville, well known there. He also seems to have lived for four years in Hartselle. In fact, the agent of the Western Union Telegraph Company at Hartselle seems to have known Boteler, and he testified that he found out in 30 minutes after he received the message, to which we hereafter refer, the place where the plaintiff lived. Mrs. Boteler had a brother, Jim Anderson, who lived in the country near Tuscumbia, and he died, unexpectedly, on Saturday night December 18, 1910, at his home. On Sunday morning, the 19th, Mrs. Linda Anderson, the widow of said Jim Anderson, sent a message to Mrs. Ferguson, who resided in Tuscumbia to send a telegram to Mrs. Boteler, at Danville, informing her of her brother's unexpected death, and asking her to come. At 9:15 that morning a brother of Mrs. Ferguson delivered to the agent of the Telegraph Company at Tuscumbia the following message for transmission and delivery: "Mrs. J. M. Boteler, Danville, Ala., via Hartsell. Your brother Jim Anderson died unexpectedly last night. Come. Linda." The words "via Hartselle" were written in the message by the agent, and the message was written upon one of the ordinary telegraph blanks of the Telegraph Company for "unrepeated" messages. The agent demanded and was paid 50 cents for the contemplated service, 25 cents for the toll to Hartselle, and 25 cents for the telephone toll from Hartselle to Danville. The message left Tuscumbia at 9:30 a. m., and reach Hartselle at 10:15 a. m., or within three-quarters of an hour after it left Tuscumbia. The agent testified that he "tried to communicate with Danville by telephone but *the telephone exchange had been discontinued.*" The agent at Hartselle, *who then knew where plaintiff lived*, then sent to the office at Tuscumbia the following office message: "Yours date to Mrs.

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Boteler signed Linda undelivered. No telephone connections at Danville. Advise if charges guaranteed for special delivery." When that office message reached Tuscumbia the evidence fails to inform us. The evidence does show that Mrs. Ferguson's brother, who, in defendant's office at Tuscumbia, wrote out the message signed "Linda," and paid the 50 cents toll, lived in Tuscumbia—which is a small town—and that the agent of the defendant, who started the telegram on its way from Tuscumbia to Danville, not only knew him but knew his sister, Mrs. Ferguson, Jim Anderson, the deceased, Mrs. Linda Anderson, and the plaintiff. The office message reached Tuscumbia, and the jury were authorized to infer that it reached there within a reasonable time. The agent at Tuscumbia, some time during Sunday—but at what time the evidence fails to inform us—ascertained that the special delivery charges inquired about in the office message would be guaranteed. We know this because the agent at Hartselle—the same agent who received the message signed "Linda," and who sent to Tuscumbia the above office message—testified that "I received an answer to that service message at 12:30 Sunday night." The answer to the service message stated that said special delivery charges would be paid. Says this witness: "I came on duty 7:15 next morning after receipt of service message. I then employed Mr. Walden, a special messenger to carry it." The message was given to Walden about 8 o'clock Monday morning and Walden delivered it to the plaintiff at her home at 11:00 or 11:15 that morning, too late for her to go to Tuscumbia to her brother's funeral. On that same Monday morning the agent of the defendant informed Mrs. Ferguson in Tuscumbia, that the message signed "Linda" had not been delivered, and that *woman* living in Tuscumbia, not Hartselle,

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and not engaged in the service of the public, and therefore owing no *duty* to the plaintiff, out of womanly sympathy undertook in *her* way, on that same morning, to get to the plaintiff the news of her brother's death, and when Walden reached the plaintiff's residence he found that Mrs. Ferguson had already, in a way devised by her, a *half hour before*—but too late to aid the plaintiff—informed the plaintiff of her brother's death.

The message in this case showed on its face its extreme importance to the plaintiff. It showed on its face the unexpected death of her brother. It showed that he died Saturday night. It called the sister to Tusculumbia, evidently to the funeral, and as the death occurred on Saturday night, it was reasonably apparent that he would probably be buried on Monday. At Hartselle the office of the defendant is kept open day and night. When the agent at 12:30 Sunday night received the office message informing him that the special delivery charges would be paid, he *knew* how long a delay had already occurred, and how important it was *then* for the telegram to be delivered. And yet, without making any effort to get a messenger that night to carry that important message, and without making any effort to have one ready at an early hour the next morning, he goes to bed, rises in the morning, comes down to the office at 7:15 and then, for the first time, about 8 o'clock, employs a messenger to take the message.

The gravamen of the complaint is *not the failure* of the defendant, to deliver the message at *Danville*, but the *negligent delay* of the defendant in delivering the message to Mrs. Boteler *at her home*, and the damages which resulted to her by reason of that delay. If the defendant had carried out its original contract, and had delivered, at a telephone office in Danville, the message, this suit would probably not have been

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brought. It was a question for the jury, under all the evidence in this case, to say whether the defendant was not guilty of unreasonable delay in delivering the message to Mrs. Boteler under the contract as modified by the office messages. It was also a question for the jury to say whether, if due diligence had been observed in delivering the message after the agent at Hartselle received the office message, to which we have above referred, the plaintiff would not have received the telegram in time to attend her brother's funeral.

"Where a service message demanding special delivery charges is sent, the company will not be liable for failure to deliver the message if the sender refuses to pay or guarantee the extra charge; and, if such payment or guaranty is made it does not become effective so as to require a delivery until the answering message advising the terminal operator of this fact is received, but the company will be liable for negligent delay in sending the service message, or in failing to make delivery of the message after the answering message is received."—37 Cyc. p. 1680.

When, according to the admissions of the agent at Hartselle, the information that the company would receive payment for the special delivery charges was received at Hartselle at 12:30 Sunday night, the agent knew the pressing necessity that existed for Mrs. Boteler to receive the message. He knew its importance to her, the place where she lived, and the delay which had already occurred in getting to her the important information which the message contained. What might constitute diligence in delivering one sort of a telegram might, the agent being fully informed of the nature and importance of the telegram, be unreasonable delay in delivering another sort of a telegram, and in this case, under all the facts, the question as to whether the de-

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fendant performed its duty in and about the delivery of the telegram was a question for the jury.

2. The third count, which claimed exemplary damages, was withdrawn by the plaintiff before the jury retired. The trial court, therefore, committed no error in refusing to charge the jury that they could not find for the plaintiff under the third count of the complaint. There was no such count in the complaint when the case went to the jury.

There is no error in the record. The judgment of the court below is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Trespass to Realty.

(Decided May 1, 1913. Rehearing denied June 19, 1913.
62 South. 874.)

1. *Abatement and Revival; Another Action Pending; In Equity.*—The pendency of a suit in equity is not grounds for a plea in abatement of an action at law; the remedy is to apply to equity to require the movant to elect as to which action he will first prosecute to judgment.

2. *Corporations; Actions Against; Misnomer.*—A plea as to the name of the corporation "Southern Railway Company" and "The Southern Railway Company" is frivolous and technical and will not be considered.

3. *Appcal and Error; Harmless Error; Pleading.*—The sustaining of demurrers to pleas setting up matter available under the general issue is harmless, where the general issue is pleaded.

4. *Discovery; Interrogatories; Answers as Evidence.*—The answers of a party to interrogatories propounded by the adverse party under the statute are treated as pleading and evidence, and the party taking them may or may not introduce them in evidence, and the party answering cannot offer his own answers in evidence; but where the party taking interrogatories of the opposite party, introduces the answers in evidence, he must introduce them as a whole.

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5. *Same; Responsiveness.*—Answers to interrogatories taken under the statute need not be responsive as the party required to answer may explain or avoid his answer.

6. *Same; Failure to Answer; Penalty.*—A party propounding interrogatories to the adverse party under the statute may insist on complete answers, or move to have the statutory penalties enforced for failure to answer.

7. *Trespass; Land; Damages.*—The fact that a tree was cut down, a fence torn down, and the soil on the land taken up, and that these wrongs were committed in the yard of the dwelling house, over protest, if sustained by the evidence is available on the issue of punitive damages, and hence, the court did not err in refusing to strike such allegations from the complaint.

8. *Same; Defenses.*—It is no defense to an action for trespass to real estate that one of the plaintiffs was a married woman and lived with her husband and children on the land at the time of the trespass.

9. *Same; Evidence.*—Evidence of a conversation between plaintiff and the agent of defendant who is alleged to have authorized the trespass, had at the time of the trespass, wherein plaintiff protested against the trespass, and the agent insisted that defendant could do the act complained of was admissible in an action by plaintiff against the principal of the agent for trespass to real estate.

10. *Same.*—On the question of punitive damages in an action for trespass to realty, testimony disclosing the character and intent of the wrong doer is admissible, although inadmissible to show actual damages.

11. *Same; Jury Question; Title.*—Under the evidence in this case the issue of the title of plaintiff, claiming title by adverse possession against defendant having the legal paper title, was for the jury.

12. *Same; Wrongful Entry by Owner.*—Where the action was trespass to realty, and defendant shows his ownership of the land and right to entry, he shows a complete defense though the entry was by force, and over the protest of plaintiff, the injury suffered by plaintiff by use of force by defendant being recoverable in an appropriate action therefor.

13. *Same; Right of Recovery.*—By showing possession only, a plaintiff may recover in an action of *quare clausum fregit* as against a mere trespasser, but he cannot recover as against the true owner having immediate right of possession.

14. *Same.*—The action of *quare clausum fregit* is an action for damages for injury to land, or the possession thereof, and where plaintiff does not own the land and has no right to possession against defendant, there can be no recovery; whatever damages plaintiff may have suffered in his person or as to other property.

APPEAL from Morgan Circuit Court.

Heard before Hon. D. W. SPEAKE.

[Southern Railway Co. v. Hayes, et al.]

Action by Fannie Hayes and others against the Southern Railway Company for trespass quare clausum fregit. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for another trial.

The defendant moved to strike from the complaint the following averments: "And for cutting a tree thereon and for tearing down a fence and digging up the soil thereon." Also the following: "Plaintiff avers that said wrongs and injuries were committed by defendant in the yard of the home and dwelling of these plaintiffs, and within a few feet of the dwelling house, and over the protest and expostulations of Fannie Hayes, mother of the other plaintiffs, and by Ben Hayes, husband of Fannie Hayes and father of the other plaintiffs."

The following are the pleas referred to:

"(2) That at the time of the alleged trespass the lands in question were the property of this defendant."

"(4) Prescription of 20 years.

"(5) That, at the time of the commencement of this action and of the alleged trespass, the plaintiff Fannie Hayes was a married woman, her husband being one Ben Hayes, and they with their children, the infant plaintiff, were living on the premises involved in this case at the time mentioned; that said Ben Hayes was and is the head of the household and proprietor of the premises, and he alone is the proper person to bring this action."

WERT & LYNNE, for appellant. The court erred in sustaining demurrers to defendant's plea in abatement.—*Foster v. Napier*, 73 Ala. 595, and authorities cited; *Cannon v. Brame*, 45 Ala. 262. The corporation must be sued by its true name.—1 Blackstone 474. The motion to strike the averments of the complaint was

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the proper practice and the motion should have been granted.—*C. of Ga. v. Keyton*, 41 South. 921; *Brinkmeyer v. Bethea*, 139 Ala. 376; *Gosden v. Williams*, 44 South. 612; *Buck v. L. & N.*, 48 South. 699. The husband is the proper person to bring the suit, and the wife was improperly joined.—*Strauss v. Leipf*, 101 Ala. 439. Pleas 2, 3 and 4 were proper.—*Dean v. Fail*, 8 Port. 491; *McInery v. Irvin*, 90 Ala. 276. Pleas 5 and 6 were good.—Authorities supra. The court erred in excluding portions of the answer to the interrogatories.—*Sullivan T. Co. v. L. & N.*, 163 Ala. 125; *Carwile v. Franklin*, 51 South. 396; *Prestwood v. Carleton*, 50 South. 254; *Saltmarsh v. Bower*, 22 Ala. 221. Written charge No. 1 should have been given.—2 Thomp. on Trial, sec. 2243, et seq. Only nominal damages were recoverable.—60 Atl. 643; 85 N. W. 138; 26 S. E. 19; 47 S. W. 675; 30 S. E. 21. Counsel discuss other assignments of error, but without further citation of authority.

KYLE & HUTSON, and E. W. GODBEY, for appellee. Any "paper title" referred to by the court which the railroad may have had, could not palliate, much less justify the admitted forcible breaking and entry (into the restricted curtilage of a long and peaceably occupied dwelling) without notice, by foremen, engineer, plows and a host of negroes and mules, all making, simultaneously, the utmost use of the various instruments of destruction, by sheer main strength and awkwardness. *Morris v. Robinson*, 80 Ala. 291, 294; *Iron Mtn., etc., R. Co. v. Johnson*, 30 L. Ed. 505, 119 U. S. 609; *Denver, etc., R. Co. v. Harris*, 30 L. Ed. 1147, 122 U. S. 606; *State v. Bryant*, 103 N. C. 436; *State v. Davis*, 14 L. R. A. 206; *Mosseller v. Deaver*, 106 N. C. 494; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 672; *Croff v. Ballin-*

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ger, 18 Ill. 200, 65 Am. Dec. 735; *Sinclair v. Stanley*, 69 ex. 718; *Westcott v. Arbuckle*, 12 Ill. App. 577; *Reeder v. Burdy*, 41 Ill. 279; *Emerson v. Sturgeon*, 54 Mo. 404; *Dilworth v. Fee*, 52 Mo. 130; *Hoffman v. Harrington*, 22 Mich. 52; *Dustin v. Cowdry*, 23 Vt. 631; *Farrell v. Warren*, 51 Ill. 467; *Larkin v. Avery*, 23 Conn. 304; *Mason v. Hawes*, 52 Conn. 12; *Commonwealth v. Donahue*, 2 L. R. A. 625; *Mosseller v. Deaver*, 8 L. R. A. 537. The 10 to 20 negroes, the drove of harnessed mules, and the five or six scrapers that so crowded the premises that there was not room in the little yard for them to turn around; and the axemen and sappers, noisily hammering away at the yard fence, upheaving the posts, and tumbling them down the cut, constituted force and violence of the rankest order, and required the imposition of punitive damages, even though the outcome did not occasion a visit from an undertaker or surgeon.—*State v. Polock*, 42 Am. Dec. 141, 26 N. C. 305; *State v. Davis*, 19 L. R. A. 206; *State v. Armfield*, 27 N. C. 207; *State v. Barefoot*, 89 N. Car. 565; *Steinlein v. Halstead*, 42 Wis. 422; *Allen v. Tobias*, 77 Ill. 169; *Denver, etc., R. Co. v. Harrish*, 122 U. S. 608; 30 L. Ed. 1148; *Rawson v. Putnam*, 128 Mass. 522; *Mosseller v. Deaver*, 106 N. Car. 494. While title in this case is entirely immaterial, the twenty years of occupancy up to the fence, upon the supposition that it was the true line, even though that supposition may have been erroneous, constituted adverse possession up to that fence, and gave title.—*Hoffman v. White*, 90 Ala. 354; *Johnson v. Thomas*, 23 App. Cas. (D. C.) 150; *Alexander v. Wheeler*, 69 Ala. 332; *Northern Pacific Ry. Co. v. Ely*, 87 Am. St. Rep. 774; *Matthews v. Lake Shore, etc., R. Co.*, 64 Am. St. Rep. 336; *Maysville, etc., R. Co. v. Holton*, 39 S. W. 27. The occupancy of this alleged railroad land for yards, houses and flower gardens and fences, was

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alien to the original railroad use; hostile to the purpose of the company, and incompatible with the performance of any of its functions, and was therefore inherently, *ipso facto*, adverse:—*N. W. P. Co. v. Ely*, 87 Am. St. Rep. 734; *Matthews v. Lake Shore, etc., R. Co.*, 64 Am. St. Rep. 336; *Maysville, etc., R. Co. v. Holton*, 39 S. W. 27.

MAYFIELD, J.—This was an action of trespass *quare clausum fregit*. The alleged trespass was that the defendant, appellant here, had cut down an embankment on the plaintiffs' land to enlarge or improve its right of way. The defense was, practically speaking, that the embankment cut down was the property of the defendant and constituted a part of its right of way, and that it was in the possession thereof, as a part of its right of way, at the time of and before the commission of the alleged trespass. So the real dispute was as to who was in the possession of the land on which the alleged trespass was committed.

There was no error in sustaining the demurrer to the plea in abatement of a former suit pending. The plea, at best, alleged the pendency of a suit in equity. This, as a rule, is not a good plea in abatement of an action in a court of law. The remedy in such cases is to apply to the court of equity to require the plaintiff to elect as to which action or suit he will first prosecute to judgment. It was at an early date said by the Supreme Court of Massachusetts (*Colt v. Partridge*, 7 Metc. [Mass.] 570-576): "The pendency of a bill in equity has not usually been considered as a sufficient ground for sustaining a plea in abatement to an action at law. When both suits are commenced by the same party, it may furnish a proper occasion for a motion to require the party to elect which action he will first proceed in,"

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etc. This case was followed by this court in *Humphries v. Dawson*, 38 Ala. 204, where it is said: "It appears, also, that the pendency of a bill in equity has not usually been considered sufficient ground for a plea in abatement of a suit at law.—*Colt v. Partridge*, 7 Metc. (Mass.) 570, 576; *Blanchard v. Stone*, 16 Vt. 234; *Hatch v. Spofford*, 22 Conn. 495-596 [58 Am. Dec. 433]; Story's Conflict of Laws, § 610a (Bennett's Edition)."

The plea of misnomer, as to the name of the defendant corporation, "Southern Railway Company," and "the Southern Railway Company," is both too frivolous and too technical to be noticed.

There was no error in the trial court's declining to strike from the complaint certain allegations as to certain acts of trespass or wrongs mentioned therein. If proven, they were circumstances for the consideration of the jury in determining punitive damages, if such could be shown. The rule of law as to the measure of actual damages in such cases did not render such averments improper on the question of punitive damages.

The first and second counts of the complaint practically followed the forms prescribed in the Code for such actions and were sufficient.—Section 5382, form 26, pp. 1199- 1200, vol. 2, of the Code of 1907.

There was no error in sustaining demurrers to pleas 2 and 4. If there could be said to be any merit in either, the same matter was availing under the general issue, and, if error, it affirmatively appears that it was without injury. But we do not mean to say that there was error therein.

Plea 5 was clearly bad, if not frivolous. It was no defense to this action that one of the plaintiffs' was a married woman and lived with her husband and children on the land at the time of the alleged trespass.

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There was no error in allowing Fannie Hayes, one of the plaintiffs in this case, to testify as to the conversation had between her and the defendant's agents who are alleged to have authorized the commission of the trespass. This conversation occurred at the time of the trespass and was, in parts, plaintiff's protest against the act complained of and the defendant's or its agents' insistence that the defendant had the right to do the act complained of.

Much of the evidence objected to by the defendant was a part of the *res gestæ*; and the other, if not, was admissible because between the parties or their authorized agents and about the subject-matter in dispute; and much of it was admissible for the jury to consider in determining the character and intent of the alleged trespass, and therefore bore upon the question of punitive damages. This was true although it was not admissible to show the extent or the amount of the actual damages.

The trial court did, however, err in excluding portions of the defendant's answers to the interrogatories propounded to it by the plaintiff because not responsive to the interrogatories. If this had been an ordinary deposition of a witness, the rule would be different, but we do not mean to indicate what our ruling would be, if such were the case presented. Interrogatories to the parties, and their answers, under this provision of the Code, as has been frequently held, are in the nature of bills of discovery in equity. The proceeding is frequently spoken of and referred to as a statutory bill of discovery. The answers to the interrogatories, in such cases, are treated as pleadings as well as evidence. The party propounding the interrogatories may insist upon and compel full and complete answers or have the statutory penalties enforced against his adversary for fail-

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ure to answer. When the answer is thus obtained, the party demanding it may offer it in evidence or not, as he sees fit. The party answering cannot offer his own answer in evidence. If the party demanding the answer introduce it in evidence, he must introduce it as a whole; he cannot introduce a part only, or, having introduced the whole, have parts of the answer stricken because not responsive or because they are self-serving. This court, at an early date, held that: "The plaintiff, after obtaining the discovery, is not bound to read the answer, but it is optionary with him to read it or not. Unless he choose to read it, the other party cannot, so that in all cases he has the privilege of experimenting upon the chances of benefit which a discovery may afford. If he offers a portion of it, he makes the whole evidence and submits for the jury to determine what weight they will give it. Some confusion has been introduced into decisions by not observing the distinction between an answer as evidence in the cause in equity in which it is made and when offered in the common-law court. In the first it is only evidence so far as it is responsive; but in the latter, the whole being evidence, it is for the jury to give to each portion whatever of weight they may think it deserves."—*Saltmarsh v. Bower*, 22 Ala. 221, 230. This case overruled the case of *Lake v. Gilchrist*, 7 Ala. 955.

In the case of *Sullivan Timber Co. v. Louisville & Nashville Railroad Co.*, 163 Ala. 125, 50 South. 941, the cases were reviewed, and it was there said, referring to *Saltmarsh v. Bower*, 22 Ala. 221: "This state of the law, in this regard, remained without reflection upon its correctness until the decision in *Bank v. Leland*, 122 Ala. 289, 294, 25 South. 195, when for the first time so far as we are advised, it was said in effect that answers merely irresponsible might be stricken."

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Garrison v. Glass, 139 Ala. 512, 36 South. 725, followed *Leland's Case*, *supra*, both of these cases were expressly overruled in *Sullivan's Case*, 163 Ala. 125, at pages 136, 137, 50 South. 941, at page 944. The reason for the rule and its enforcement was well stated by McClellan, J., in the last case referred to. It is there said: "If the interrogatee should be confined in his answers to only those interrogatories responsive to the interrogatories propounded to him, the power would be thereby given the interrogator to extract from the interrogatee only matters favorable to his action or defense and leave the interrogatee dumb to explain or avoid in his answers the favorable (to the interrogator) fact or circumstances so elicited. Such a result cannot be sanctioned, especially in view of the fact that answers to pertinent interrogatories, not otherwise improper or exempted from the requirement to be answered, may be compelled under rigorous penalties. The serious consequence indicated is not avoided by the fact that the party interrogated may testify on the trial; and this for the reason, among others, that the interrogatee may die or become otherwise disqualified to testify between the time he is required to and does answer and the time of the trial."

We are also of the opinion that the trial court erred in giving the affirmative charge for the plaintiff. There can be no doubt that the railroad company had acquired the legal title to the land alleged to have been trespassed upon, unless the plaintiff had acquired title thereto by adverse possession. We are now speaking of the legal title, aside from the actual possession of the band of land alleged to have been trespassed upon.

The defendant showed a perfect, proper, title to a right of way of 66-foot width at the point where the land is claimed to have been trespassed upon, and the

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land claimed to have been trespassed upon was included within this 66-foot right of way. If the plaintiff's evidence was to be believed, she may have acquired the legal title to the strip of land in question by adverse possession, but in this manner only. Her paper title was bounded by the right of way, which right of way included the land or zone in dispute. It was therefore a question for the jury, under all the evidence, whether or not her possession of this strip was adverse to the defendant or whether or not it was permissive. The bona fides of her possession and that of those under whom she claims was a question for the jury and not one for the court, under the evidence in this case.

There is little, if any, doubt, we think, after examination of this record, that the plaintiff and those under whom she claims never intended to hold or claim, except to the right of way, and that the strip of land claimed was a part of the right of way; but the boundary line between the right of way and the plaintiff's property was uncertain. It may be that she and they claimed this strip as their own and were not holding it with the permission or consent of the railroad company. On the other hand, it may be that this possession of the plaintiff and those under whom she claims was not adverse to the defendant but was in recognition of the defendant's rights. This was a question for the jury, under all the evidence, and the court erred in taking this question from the jury.

It is true there is some evidence in the record that the defendant went more than 33 feet from the center of the track and therefore off the right of way in plowing up the land; but there was other evidence to the effect that the defendant did not go beyond the right of way. This was therefore a question for the jury.

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When we said above that the lands in question were a part of the right of way, we were speaking generally.

This action is trespass quare clausum fregit and not trespass de bonis asportatis, or vi et armis against the person, nor is it forcible entry. The rule of law insisted on by counsel for appellees that the owner of land cannot take or retake possession of his own land by force applies to any one of the last three actions but not to the first mentioned. It is a perfect defense to an action of trespass quare clausum fregit to show that the defendant owns the land in question, and that he had, at the time in question, the right to enter; and the fact that he entered by force, over the protest of plaintiff, does not destroy his defense. If he uses more force than is necessary and injures the person or the property of the plaintiff, he is liable in an appropriate action; but that action is not quare clausum fregit. This action is to recover damages as for injury to the land, and if the plaintiff did not own the land, and his possession was wrongful, he could not suffer any damages, so far as the land was concerned, whatever damages he may have otherwise suffered in person or estate.

It is very true, as contended by counsel for appellees, that a man cannot take the law in his own hands and right wrongs against him or his property by force, and that if he do so he is liable for the consequences of his wrongful and forceful acts; yet he must be brought to account in an appropriate action which the law has provided.

It has ever been the law in this state that title to the particular land and immediate right to the possession was a complete defense to an action of trespass quare clausum fregit. It has likewise ever been the law in this state that, if the owner, in taking possession of his property, used more force than was necessary to regain

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the possession of his own, he was liable in damages for all injuries inflicted in consequence thereof and might also be liable criminally, and that in an appropriate action it is no defense that he was retaking possession of his own property. It is no defense to an action of forcible entry and detainer that the defendant owned the land and had the immediate right to possession; but this is a complete defense to an action of trespass quare clausum fregit. This has ever been the law in this state, certainly from 1833, the date of *Duncan v. Potts*, 5 Stew. & P. 82, 24 Am. Dec. 766, down to 1901, the date of *Louisville & Nashville Railroad Co. v. Hall*, 131 Ala. 161, 32 South. 603. In the latter case it is said: "As against a stranger, actual possession will support the action, without regard to whether plaintiff had title at the time of the alleged trespass.—*Duncan v. Potts*, 5 Stew & P. 82 [24 Am. Dec. 766]; *Lankford v. Green*, 62 Ala. 314. But, as against one having title to the property alleged to have been trespassed upon and having been wrongfully denied possession, in 26 Am. & Eng. Ency. Law (1st Ed.) 600, it is said: 'One having title to property and wrongfully denied possession can enter without being guilty of trespass; so a tenant, mortgagor, or other person, without title, may have a present right of possession which will justify his entry or enable him, if in possession, to maintain trespass for the wrongful entry of another.' See, in support of this proposition, note 1 on page 600 and note 1 on page 601 of the same volume where the cases are collated. This principle was recognized in *Hernndon v. Bartlett*, 4 Port. 481, where the court held that the plea of liberum tenementum was an answer to a complaint in trespass quare clausum fregit alleging entry with force and arms and was proper matter for

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special plea. See, also, 26 Am. & Eng. Ency. Law (1st Ed) 632-634."

As against a mere trespasser the plaintiff may recover in an action of *quare clausum fregit* by showing possession only; but as against the true owner, having immediate right to possession, of course, he could not. This is made clear by all the authorities. "Possession, whether founded on a good or bad title, will support the action against a stranger or wrongdoer. Or the possession may be tortious, and a wrongdoer cannot justify or excuse an invasion of and injury to it.—*Duncan v. Potts*, 5 Stew. & P. 82 [24 Am. Dec. 766]; 2 Green. Ev. § 618. The title may be, and often is, drawn in question; the gist of the action is nevertheless the injury to the plaintiff's possession."—*Lankford v. Green*, 62 Ala. 314, 318.

The case of *Morris v. Robinson*, 80 Ala. 291, does not, in our opinion, decide to the contrary of what we now decide. There is a dictum in that opinion, quoted by appellee, which might be construed otherwise; but certainly nothing was decided in that case contrary to what is decided in this case. A judgment for the plaintiff in that case was reversed on account of an erroneous ruling as to evidence. If the affirmative charge could and should have been given in that case, without regard to the objectionable evidence, the judgment would not have been reversed. Aside from the title, the plaintiff had shown as strong a case as the plaintiff has shown in this case. In that case "the plaintiff showed that he had been in possession of the land upon which the alleged trespass was committed for 25 years; that in March, 1884, the defendant, Morris, with two or three other men, came on the land, which was near plaintiff's house, and informed plaintiff that he (Morris) had come to move the fence; that plaintiff notified

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Morris that if he moved the fence he would prosecute him; that Morris and those with him did move the fence about 20 yards, which cut the plaintiff off from his (corn) crib, stable, shop, and spring, besides turning out some of plaintiff's fruit trees, which latter were injured by stock. Plaintiff testified that he recovered the land in a few days in an unlawful detainer suit before a justice of the peace." The learned chief justice who wrote that opinion clearly recognized the rule we have stated in this case that title and right to possession are sometimes material issues in actions of trespass quare clausum fregit. On this subject he spoke as follows: "In trespass quare clausum fregit, title is not necessarily in issue, although there are many cases in which it does become material. Possession is the great underlying fact which supports the action, but title is sometimes material in defining the extent of the possession. There are other points of view in which title sometimes becomes a material inquiry.—6 Wait, Ac. & Def. 64, 65. And it may become material in mitigation of damages. One having title, or honestly believing he has title to lands, who takes possession peaceably, in the honest belief he may do so, would receive less condemnation by a jury than if he were a willful trespasser, asserting no claim of right."—80 Ala. 294.

The rule which we have declared in this case, and which was declared in the other decisions of this court cited above, is stated in Cyc. (volume 38, pp. 1047-1049) as follows: "Where the owner of land with right to immediate possession uses force in the exercise of his right to enter or retake possession, the question of his liability has been variously determined. The better opinion seems to be that title and right of possession is a good defense to a forcible entry by the owner of land on one holding possession, and forcible expulsion of such oc-

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cupant or forcible removal of part of the realty. At any rate, the weight of authority is strongly against ever allowing an action of trespass to land against the owner of realty with immediate right to possession, and the rule has not been changed by statutes making forcible entry a crime or ground for civil action for restoration of possession; and the better opinion seems to be that in the absence of statute no civil action for damages lies against him in any form if no more force was used than was necessary, but that, if the personalty or the person of the occupant is injured by excessive force or by carelessness, the owner of the land is liable therefor."

In a Massachusetts case (*Sampson v. Henry*, 13 Pick. [Mass.] 36) the owner, a landlord, one or two days after the lease had expired, while the tenant's wife was in travail, entered the land over the protest of the tenant and broke open the house in which the tenant was living; the tenant claiming that the lease had not expired. The tenant sued the landlord in trespass quare clausum fregit, and the court held that there could be no recovery in that action, though there might be a recovery as for other wrongs, offenses, and injuries.

The theory is that this action is solely to recover damages as for injuries to the land or to the possession thereof; and, if the plaintiff did not own the land and had no right to the possession as against the defendant, then of course the former could suffer no damages as to the land or the possession; whatever damages he may have suffered in other respects, and as to other property or to person.

In the case of *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272, this earlier case was reviewed, and the court through Gray, C. J., speaking of the case of *Sampson*

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v. Henry, 13 Pick. (Mass.) 36, said: "In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held that the plea of liberum tenementum was a good justification of the charge of breaking and entering the house but not for the personal assault and battery. That decision, so far as it held that the landlord was not liable to an action of trespass quare clausum fregit by a tenant at sufferance for a forcible entry, has been repeatedly affirmed.—*Meador v. Stone*, 7 Metc. [Mass.] 147 *Miner v. Stevens*, 1 Cush. [Mass.] 482, 485; *Mason v. Holt*, v *Allen* [Mass.] 45 *Curtis v. Galvin*, 1 Allen [Mass.] 215; *Moore v. Mason*, 1 Allen [Mass.] 406. And, so far as it allowed the plaintiff to recover, in such an action, damages for the incidental injury to him or to his personal property, it has been overruled.—*Eames v. Prentice*, 8 Cush. [Mass.] 337."

The other assignments of error have been examined and those insisted upon carefully; and we find no error except as to the matters pointed out. Of course the two questions as to which we reverse entered into some of the other assignments (that is, the evidence excluded, which we hold to have been erroneously excluded, ought to have been admitted); and the right to recover any damages ought to have been left to the jury.

For these errors, the judgment must be reversed, and the cause remanded for another trial.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Trespass to Realty.

(Decided June 5, 1913. 62 South. 766.)

1. *Appeal and Error; Record; Presumption.*—In an action for trespass quare clasum, where defendant pleaded dedication of the locu in quo for a highway, and the bill of exceptions recited that defendant introduced in evidence, "the dedication of the road," but neither the form nor the language of the dedication, nor when, nor by whom, nor to whom it was made, was shown, it will be presumed that the dedication was a formal and absolute one made by the owner of the land for the use of the general public prior to the trespass complained of.

2. *Dedication; Use of Land for Highways.*—Evidence of the use of land by the public for a road for many years is sufficient to perfect dedication of the land for a highway.

APPEAL from Blount Circuit Court.

Heard before Hon. JAMES E. BLACKWOOD.

Action by W. L. Smith against the Southern Iron & Steel Company, for trespass to realty. Judgment for defendant and plaintiff appeals. Affirmed.

GEORGE W. DARDEN, and JAMES KAY, for appellant. Corporations are responsible civilly for the authorized acts of their agents or servant, or when they ratify the same.—*So. C. & F. Co. v. Adams*, 131 Ala. 158. The use of wild and unenclosed lands by the public confers no rights on the public, and raises no presumption of dedication, no matter how long a period it may continue.—13 Cyc. 484; *Gage v. M. & O.* 84 Ala. 224. Counsel discuss the admission of the dedication proceedings, but in view of the opinion, it is not deemed necessary to here set it out.

W. A. WEAVER, for appellee. Nothing is shown in the bill of exceptions relative to the form, language or

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otherwise of the dedication, and the presumption will therefore be indulged that there was a dedication for the purpose of supporting the rulings of the trial court. The evidence was sufficient to perfect the dedication.—*Steele v. Sullivan*, 70 Ala. 589; *Forney v. Calhoun County*, 84 Ala. 215.

SOMERVILLE, J.—Appellant sued appellee, a corporation, for trespass upon his lands. The first count is in trespass quare clausum, and the second is in case for trespass by defendant's servants acting in the course of their employment. The evidence shows that the trespasses complained of consisted in tearing down some wires stretched across a road, and the passage over the road of sundry persons alleged to be in the service or employment of defendant.

The trial court gave the general affirmative charge for defendant. The bill of exceptions recites that defendant introduced in evidence the "dedication of the road." Neither the form nor the language of this dedication, nor when, nor by whom, nor to whom it was made, is shown by the bill.

In this state of the record every reasonable presumption will be indulged in favor of the rulings of the trial court, and we are bound to presume that the dedication referred to was a formal and absolute dedication of the roadway in question, made by the owner of the land prior to the trespasses complained of for the use of the general public.

And the evidence of use by the public for many years is sufficient to perfect the dedication.—*Steel v. Sullivan*, 70 Ala. 589; *Forney v. Calhoun County*, 84 Ala. 215, 4 South. 153. Such being the case, as matter of law the use of the road by defendant or its servants was not in violation of plaintiff's rights, and he was not entitled to recover.

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The several rulings of the trial court on the evidence complained of by plaintiff did not affect this result, and their merit need not be considered.

For aught that is shown by the record, the trial court cannot be held in error, and the judgment will be affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SAYRE, JJ.,
concur.

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Trover and Trespass.

(Decided June 5, 1913. 62 South. 845.)

1. *Action; Misjoinder; Trespass and Case.*—Where, in one count it is alleged that the servants of defendant, acting within the scope of their authority, took and carried away or consumed personal property and also took charge of and injured certain oxen, and took charge of three wagons, and damaged two of them, it was bad for joining in one count both trespass and case.

2. *Pleading; Amendment; Demurrer; Refiling.*—Where a complaint is amended by adding distinct counts, after a demurrer to the original counts is overruled, the demurrer is not required to again interpose the demurrer to the amended counts in order to save for review the rulings on demurrer to the original count.

3. *Trespass; Defense; Ratification by Principle; Acts of Agent.*—As a defense to an action of trespass for property wrongfully taken and damaged, a plea alleging that plaintiff's agent voluntarily surrendered the property to defendant was defective for failing to allege the authority of plaintiff's agent to so dispose of the property, or that plaintiff afterwards ratified the acts of his agent with full knowledge thereof.

4. *Same; Evidence.*—Although not admissible as an absolute defense to an action for damages for wrongfully taking possession of property and damaging it, evidence that plaintiff had a contract with defendant requiring the use of the property taken, and while performing the contract plaintiff became a fugitive from justice, and left his property with another who delivered it to defendant, who retained possession thereof, and surrendered it to plaintiff on his return, was admissible on the question of damages.

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5. *Same.*—Where the action was for damages for taking and injuring personal property, and the defense alleged in the plea was that defendant held a mortgage covering the property, and that plaintiff became a fugitive from justice, abandoned the property, and that defendant took the control thereof, under the mortgage for plaintiff's benefit and protection, it was competent for defendant to show on the examination of plaintiff that plaintiff became a fugitive from justice as alleged.

6. *Same; Exemplary Damages.*—Evidence that defendant appropriated the property in good faith for the purpose of carrying out plaintiff's logging contract with defendant, and took good care of the property, was admissible on the question of damages although not in justification of the trespass.

7. *Same.*—Where the action was for damages to oxen and other property alleged to have been taken and damaged by defendant, and defendant claimed that it took the property to carry out a logging contract which plaintiff had made with defendant after plaintiff had abandoned the contract, evidence as to the nature and terms of the logging contract was admissible as was also repairs made by defendant to plaintiff's property alleged to have been taken.

8. *Same.*—Although a verbal agreement extending a chattel mortgage after it had been satisfied, covering chattels claimed to have been taken and damaged by defendant, was not effectual to continue the mortgage, evidence of such agreement was admissible on the question of exemplary damages sought for taking and injuring such chattel.

9. *Same; Defenses.*—The existence of a contract to perform a service for another requiring the employment of property in its performance will not justify unauthorized appropriations or injury of the property by the person for whom the service is being performed.

10. *Mortgages; Satisfaction.*—In view of the provisions of section 4288, Code 1907, a verbal agreement that a chattel mortgage should continue as security, did not continue the mortgage as the chattel mortgage where it had been previously satisfied.

APPEAL from Lamar Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Action by G. T. Duke against the Interstate Lumber Company. From a Judgment for plaintiff, defendant appeals. Reversed and remanded.

As amended, count 3 is as follows: "Plaintiff claims of defendant the sum of \$2,000 damages, for that heretofore, to wit, on or about the 1st day of November, 1910, the defendant's agents or servants, acting within the line of their duty, or within the scope of their authority, took and carried away or consumed the follow-

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ing property, to wit (here follows a description of certain personal property). And defendant's agents or servants took charge of and injured three oxen belonging to plaintiff by knocking the eyes of two oxen out and by crippling one ox in the shoulder, and defendant's agents or servants took charge of one ox belonging to plaintiff, injuring said ox, and defendant's servants or agents took charge of three wagons belonging to plaintiff, and damaged two wagons in this, one wheel was broken, and the tongue was broken out of one wagon, the property of plaintiff, and plaintiff avers that by reason of the defendant's agents or servants taking charge of said property as aforesaid, he has been damaged in the sum claimed."

The demurrers raise the questions discussed in the opinion.

Plea 5 alleges that plaintiff had entered into a contract with the Interstate Lumber Company known as a logging contract, and that on or about the 1st day of November, 1910, while said contract was still in force, plaintiff, being in possession of the property described in the complaint, and using the same in carrying out his contract with defendant, became a fugitive from justice, leaving his property in the custody and control of one Sam Payne; that said Payne willingly and voluntarily delivered the possession and control of said property to certain persons in the employ of the Interstate Lumber Company, the said possession and control continuing only a short time, to wit, 10 days, and that during said time said property was used and managed in a careful and prudent way, and for the benefit of plaintiff, and upon his return possession thereof was surrendered to him, and when so surrendered it was in substantially the same condition as when he left it.

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Plea 3 sets up that at the time of the wrongs complained of plaintiff was indebted in a large amount to defendant, to wit, \$400, which was secured by a mortgage conveying substantially all of the property described in the complaint; that plaintiff became a fugitive from justice, and abandoned said property, and such possession and control as was exercised over said property was for the benefit and protection of defendant, and was authorized under and by the terms of said mortgage, which said mortgage was executed to defendant by plaintiff, and is made an exhibit hereto.

J. C. MILNER, J. M. CHILTON, and JOHN V. SMITH, for appellant. While trover and trespass may be joined in the same suit under section 5329, of the Code of 1907, it cannot be joined in the same count, nor can trespass and case be so joined; hence, it is apparent that the demurrer to this count should have been sustained.—*So. Ry. v. McIntyre*, 152 Ala. 223. The fact that the complaint was amended by the addition of distinct counts did not require that the overruled demurrers to the original count should have been reinterposed in order for this court to review the original ruling.—*B. R. L. & P. Co. v. Fox*, 174 Ala. 657. The fact that the mortgage was to remain in effect until Duke had completed his contract, and a final settlement had been made, was admissible on the question of damages, although it might not have had the effect to extend the security of the satisfied mortgage.—*Hill v. Nelms*, 86 Ala. 447. The other evidence offered, and which the court excluded was admissible on the question of damages as certainly defendant could not be held liable under the circumstances of this case for anything more than actual damages.—*Trammel v. Ramage*, 97 Ala. 66. The court erred in refusing to give charge G.—*Stuart*

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v. Tucker, 106 Ala. 319; *Wilkerson v. King*, 81 Ala. 156; *Prestwood v. McGowan*, 148 Ala. 475. Charges L, I, M, O, and P should have been given, as no basis was shown for the assessment of punitive damages.—*Sellers' Case*, 93 Ala. 9; *Frazer's Case*, 93 Ala. 45; *Wilkerson v. Searcy*, 76 Ala. 176. Charge K should have been given.—*Ervin v. Blount*, 20 Ala. 694; *Boutwell v. Parker*, 124 Ala. 341.

HARSH, BEDDOW & FITTS and WALTER NESMITH, for appellee. The omission to reinterpose the demurrers after the complaint was amended was tantamount to a waiver or relinquishment of them.—*L. & N. v. Wood*, 105 Ala. 561; *C. of Ga. v. Ashley*, 160 Ala. 582; *W. U. T. Co. v. Crawford*, 110 Ala. 460. As amended the third count was clearly not subject to the demurrer.—*Lookout Mountain Co. v. Lea*, 144 Ala. 169; *Joseph v. Henderson*, 95 Ala. 213; *City of Jasper v. Barton*, 56 South. 43. The court was not in error in sustaining demurrers to the plea.—*W. U. T. Co. v. Dickens*, 148 Ala. 480. Whether or not Duke was a fugitive from justice, was immaterial and calculated to prejudice his case.—*Gray v. State*, 160 Ala. 107; *Jones on Evidence*, sec. The fact that there was a logging contract between plaintiff and defendant, and that defendant took the property and used it in carrying out the contract was in no sense admissible.—*L. & N. v. Perkins*, 165 Ala. 471; *Layton v. Campbell*, 155 Ala. 220; *Ray v. Jackson*, 90 Ala. 515; *Thompson v. Mawhinney*, 17 Ala. 362; *Abney v. Kingsland*, 10 Ala. 355. The fact that there was a chattel mortgage and as to the credits and the condition of the accounts between the parties, was a mere collateral matter.—*M. & W. P. R. Co. v. Edmonds*, 41 Ala. 666; *Swan, et al. v. Kidd*, 78 Ala. 173. The affirmative charge was properly de-

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nied.—*Herndon v. Bartlett*, 4 Port. 481; *Milner v. Milner*, 101 Ala. 599; *Brown v. Floyd*, 163 Ala. 317; 12 Am. St. Rep. 332. It is not necessary for plaintiff to show that the acts done were done with wrongful intent.—Authorities *supra*. The assertion that the property was delivered by an agent of plaintiff is of no avail unless it be further shown that the agent had such authority, or that with knowledge of the facts defendant ratified his acts.—*Gillam v. S. & N.*, 70 Ala. 268. The court properly refused the charges requested by defendant, as they went only to the question of damages, which under the evidence in this case was a matter for the jury to determine.—*Brown v. Floyd*, *supra*; *Milner v. Milner*, *supra*; *E. T. V. & G. v. Lockhart*, 79 Ala. 315; *Bir. W. W. Co. v. Keiley*, 2 Ala. App. 630.

MCCLELLAN, J.—Appellee instituted this action against the appellant. The substance of the wrong complained of was the taking and appropriation of, and entry upon, plaintiff's properties by the defendant's agents or servants. This action was sought to be *justified* under a mortgage executed by plaintiff and assigned to defendant; its contention being predicated of the alleged abandonment by plaintiff of the properties in question in consequence of his becoming a fugitive from justice.

The court erred in overruling the demurrer to count 3 as amended. It undertook, improperly, to join in one count *trespass* and *case*.—*City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Sou. Ry. Co. v. McIntyre*, 152 Ala. 223, 44 South. 624. In the record proper a demurrer appears as addressed to amended count 3 and the judgment entry shows a ruling thereon adverse to demurrant (appellant). The fact that the judgment entry bears at its head the date "August

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28, 1911," whereas the demurrer was filed the next calendar day, does not necessarily require the conclusion that the demurrer was filed *after* verdict or judgment. From the whole record proper it must be concluded that August 28, 1911, was the day and date on which the trial was begun, and that it was not completed to verdict *before* the amendment of count 3 was seasonably effected and the demurrer thereto presented and disposed of by the court.

The further amendment of the *complaint* by adding *distinct counts*, from amended count, to which the indicated demurrer was overruled, did not oblige the demurrant, in order to save for review the questions now under view, to reinterpose his demurrer to amended count 3.—*B. R. L. & P. Co. v. Fox*, 174 Ala. 657, 56 South. 1013.

If plea 5 should be interpreted as intending to assert as a bar to the action the alleged fact that plaintiff's agent and custodian of the property in question voluntarily surrendered the possession to the agent or servants of defendant, the plea was faulty, as the demurrer pointed out, in omitting to aver the authority of plaintiff's agent to so dispose of that possession, or that such alleged action on his (agent's) part in so disposing of the possession was later ratified by plaintiff after being fully informed in the premises. If such was not the general purpose of the pleader in this plea (5), its substance could not have any legal effect to bar a recovery, though the admissible facts asserted therein may have been proper subjects for the jury's consideration in determining the measure of the recovery, if they found plaintiff was entitled to recover.

The existence of a contract to render a service for another, which service requires the employment of property in its performance, can never *justify* the unauthor-

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ized appropriation or injury, by him to be served under the contract, of the property of him who has engaged to render that service.

Under the issues tendered by plea 3 as amended, and upon which there was joinder in issue, it was error to deny defendant the opportunity to show, if it could, particularly by questions propounded to plaintiff on his examination, that plaintiff was a fugitive from justice as the pleas averred.

The defendant sought to adduce evidence tending to show that it in good faith assumed dominion of the oxen and wagons of plaintiff, and so appropriated them to the carrying out of plaintiff's existing *logging contract* with it, carefully caring for his property, and keeping a correct account in the premises.

The court entertained the opinion, and enforced it in rulings, that this proffered testimony was entirely inadmissible. While such testimony was not to be at all considered as *justifying* the unauthorized invasion of plaintiff's rights of property, yet it was pertinent and admissible upon the inquiries, whether exemplary damages should be awarded plaintiff, and, if so, in what sum.—13 Ency Ev. pp. 44-46; *Boggan v. Bennett*, 102 Ala. 400, 14 South. 742; *Boling v. Wright*, 16 Ala. 664; *Burns v. Campbell*, 71 Ala. 271. A number of instances of error in this connection occurred on the examination of the witness McCullough.

Accordingly, also, the defendant was entitled, as bearing upon the measure of the recovery, to have admitted to the jury a full disclosure of the nature and terms of the *logging contract* existing between plaintiff and defendant of what, if so, the defendant did *in good faith* thereunder, and of what, if so, the defendant did in the repair of the wagons thus used by it.

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Whether the mortgage under which defendant sought, in amended plea 3, to *justify* the taking of the property of plaintiff had been satisfied before the assumption of possession by defendant of the property described therein appears to have been, under all the evidence, a question for the jury. If that mortgage was so satisfied, the *verbal* agreement (if made) by plaintiff that it should continue as an indemnity or security to defendant did not avail to constitute or continue the instrument such a mortgage as may be recognized in a court of law.—Code, § 4288; *Barnhill v. Howard*, 104 Ala. 412, 16 South. 1; *Williams v. Davis*, 154 Ala. 422, 45 South. 908; *Putnam v. Summerlin*, 168 Ala. 390, 53 South. 101.

Nevertheless, testimony tending to show such a verbal agreement with respect to the instrument's future effect, even if in fact satisfied before the taking by defendant of the property in question, was admissible as bearing upon the issue involved in the measure of the recovery the jury should approve if they found exemplary damages were due to be awarded.—*Boling v. Wright*, *supra*.

Manifestly, the defendant was not entitled to the affirmative charges requested by it except as to count 7, and that because of the failure of the evidence to identify the dwelling entered and possessed (if so) according to the particular description thereof incorporated in that count. There is no disputing the fact, on the evidence here, that agents or servants of the defendant took possession of chattels belonging to plaintiff. It was at least open to the jury to find that this taking was under authority or by direction of the defendant, and without *authorized* permission of plaintiff's agent, Payne, in whose custody he left the chattels. But, if that was not the conclusion to which the jury could give

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approval, the evidence is conclusive that the act of the defendant's servants or agents in taking and using the chattels they did take was subsequently ratified by the defendant.—*Burns v. Campbell*, 71 Ala. 289, 290.

Whether the plaintiff, if found due to recover, was entitled to exemplary damages was a question for the jury. It is not desirable, in view of the retrial to occur, that a discussion of the evidence in this connection should be undertaken.

The judgment is reversed, and the cause is remanded.
Reversed and remanded.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ. concur.

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Damage for Wrongful Delivery of Goods.

(Decided May 28, 1912. 59 South. 538.)

1. *Carriers; Freight; Wrongful Delivery; Liability.*—Where the agent of an express company was without knowledge as to the order, and delivered the package to a person other than the consignee without requiring proof that the person to whom the delivery was made was connected with the consignee, except letters produced by such person addressed to the consignee, the express company was liable to the consignor for a wrongful delivery, notwithstanding the person receiving the package was the one who had actually ordered its contents from the consignor.

2. *Same; Limiting Liability; Presentation of Claim.*—Under the provisions of section 4297, Code 1907, a clause in the contract of shipment requiring claims to be presented within 90 days is no defense to an action against an express company for a wrongful delivery of the goods.

3. *Same; Presentation; Time.*—The beginning of an action against the express company within the time specified by the contract of affreightment for the presentment of a claim for damages, is a sufficient presentation of such claim.

4. *Same; Charge of Court; Conformity to Evidence.*—Where the action was for a wrongful delivery, and the person receiving the

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package, though not the consignee named, had actually ordered the contents of the package from the shipper, and it was not shown that this was known to the agent of the company making the delivery, a charge asserting that the express company's agent had the right to assume that the shipment was made upon a bona fide order, and if he delivered the package of the party who made the order, the shipper could not recover for the wrongful delivery, was properly denied.

QUESTIONS certified from Court of Appeals.

The statement of the Court of Appeals certifying the questions presented is as follows:

In the above entitled case, the judges of the court being unable to reach a unanimous conclusion or decision, the undersigned judges of said court, pursuant to the provision of the statute in such cases made and provided, hereby certify to the Supreme Court of Alabama the following questions of law as to which the undersigned judges differ:

A suit was brought in the trial court by the shippers, C. L. Ruth & Son, against a common carrier, the Southern Express Company, for the conversion of a diamond ring of the value of \$165.00.

The undisputed proof showed the ring to be worth \$165.00 and to be the property of the shippers, a firm engaged in the jewelry business at Montgomery, Alabama, and that it was delivered by the shippers to the express company at Montgomery, Alabama, addressed to W. H. Barber & Co., Samson, Ala.; the value, \$165.00, being marked on the outside of the package by the shippers. It was also shown by the evidence without conflict that the package was carried by the express company to Samson, Alabama, and there delivered by its agent to the party who had ordered the ring; but this person turned out to be a swindler, who had assumed and used the name of W. H. Barber & Co.

The circumstances attending the transaction are shown by the evidence as set out in the bill of excep-

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tions to be as follows: A person, who turned out to be an impostor, addressed a letter to C. L. Ruth & Son, ordering a diamond ring to be sent on approval. The letter was written from Samson, Ala., and stated, "We desire to purchase a diamond ring," etc., and was written on printed stationery purporting to be a printed letter head of W. H. Barber & Co., setting out their business (manufacturers of naval stores), and the date line showing "Samson, Ala.," while the real place of business of this company is at Brewton, Ala., was also shown on the printed letter head, indicating that the company had a place of business at Samson, Ala., as well as at Brewton, Ala. The letter was signed "W. H. Barber & Co., by J. T. B." and referred to the rating of the company at Brewton, Ala., to be found in the commercial agencies. W. H. Barber & Co. was a reputable business concern having a good rating in the commercial agencies, and doing business at Brewton, Ala., but had no connection with any company by that name at Samson, and had no representative or office or place of business there, and no company by that name had an office or known place of business at that point.

C. L. Ruth & Son, the shippers, to whom this letter was addressed, after making inquiry of the reliability of W. H. Barber & Co., of Brewton, Ala., and being satisfied of the responsibility of that firm, but making no inquiry as to their having a place of business or representative at Samson, Ala., shipped the ring by express to Samson, Ala., in a package addressed to "W. H. Barber & Co., Samson, Ala." No special instructions were given by the shippers to the express company or any of its agents, nor was anything said or done to put the express company on notice that it was other than an ordinary open shipment. The package having been transported by the express company to Samson,

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Ala., the imposter who had ordered it called on the express company's agent for the package and it was delivered by the agent to this person after he had satisfied the agent of his identity and that he was the proper person to receive the package, by showing a package of letters or envelopes addressed to W. H. Barber & Co., at Samson, Ala., duly postmarked, etc. The evidence of the agent who delivered the package as set out in the bill of exceptions is as follows:

"That he was Agent of the Southern Express Company at Samson, Alabama; that this party came and had some express, the package mentioned, and asked for it, and witness asked him to identify himself; that he said he had nobody there that knew him; that he was just a stranger there; that he was just from Brewton, and that he had letters in his possession and took out a batch of about 8 or 10 letters and showed the witness the envelopes addressed to W. H. Barber & Co.; that there was no other firm at Samson at the time purporting to do business as W. H. Barber & Company; that he receipted for the package by signing W. H. Barber & Co., by J. T. Barber; that the shipment was forwarded from Montgomery on April 1st, and delivered in Samson April 3rd, 1911.

"Upon cross-examination the witness upon being asked what identification he demanded of the man who presented himself for the package, testified that he demanded that the party identify himself, showing that he was the right party. Upon being asked what he did do, the witness testified that he showed the witness the letters, he having a batch of envelopes addressed to W. H. Barber & Co., postmarked Samson. Upon being asked if he knew at the time he turned the package over to the party that W. H. Barber & Co., did not do business at Samson, the witness replied that he knew there

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was not any firm, prior to that time; that the party claimed to represent W. H. Barber & Co., at Samson, Alabama; that he had no written order signed W. H. Barber & Co., to deliver the package to the party. Upon being asked if he delivered the package to the party when he was shown the envelopes addressed to W. H. Barber & Co., the witness testified 'No.' That he asked the party some questions, if there was any other way he could identify himself, and the party said there was no other way he could identify himself, if witness was not satisfied that he was the right party. Witness was then asked if, as soon as the party showed witness the letters addressed to W. H. Barber & Co., witness turned the package over to him, to which the witness replied, that after witness questioned him the party said that was the only way he had to identify himself, that he could refer to the hotel man; that witness turned the diamond over to the party upon identification of letters postmarked Samson; that witness did not have any order in writing from W. H. Barber & Co., to turn the package over to J. T. Barber.

"Upon re-direct examination the witness testified that the letters were addressed to W. H. Barber & Co., Samson, Alabama."

W. H. Barber & Co., of Brewton, Ala., were shown to have had nothing whatever to do with the transaction and to have had no connection with the impostor who assumed and used the name of the company. None of the members of the company of W. H. Barber & Co., of Brewton, Ala., were personally known to or by any of the members of the firm of C. L. Ruth & Son, of Montgomery, Ala. The ring was shown to have been lost to the shippers. All evidence having a tendency to show any negligence on the part of the defendant or its agents is herein set out. There was no testimony going to

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show that the defendant or its agents had notice of the deceit or fraud being practiced by the impostor.

First. Under the facts and circumstances of this case as we have above set them out, is the defendant carrier liable to the plaintiff shippers in this action?

Or, stating the proposition as it arose upon the trial, second, was the defendant entitled to the general affirmative charge in its behalf, requested by it in writing.

Third. If it is the conclusion of the Supreme Court that the defendant was not entitled to the general charge, was the trial court in error in refusing to give at the request of the defendant the following charge requested by it in writing, to wit: "The court charges the jury that if they believe from the evidence that the defendant had a right to assume the shipment was made on a *bona fide* order and delivered the goods to the party who made the order, plaintiff cannot recover."

The above questions are submitted as abstract propositions, as directed by the statute, reference being made to the case in which the questions arise, for the convenience of the Supreme Court.

GEORGE W. JONES, and S. L. FIELDS for appellant. The demurrers to the pleas were too general.—*Ryall v. Allen*, 143 Ala. 222; *Moore v. Heineke*, 119 Ala. 627. Where the demurrer does not specify the objection it should be overruled, although the pleading is not good.—*Turk v. State*, 140 Ala. 110; *Wilke v. Johnson*, 132 Ala. 268. The clause in the contract requiring presentation of claims for damages is valid.—*Broadwood v. So. Ex. Co.*, 148 Ala. 17; 13 L. R. A. (N. S.) 753. Counsel insist that the provisions of sec. 5546 is violative of the 14th amendment, and of sec 6 of the Constitution of Alabama.—*Mobile v. Dargan*, 43 Ala. 410;

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Mobile v. R. R. Co., 45 Ala. 322; 166 U. S. 266. The court erred in not admitting the letters written by plaintiff and addressed to W. H. Barber & Co., subsequent to the delivery of the shipment.—3 Wig. secs. 2104 and 2120; *Mutual L. I. Co. v. Scott*, 54 South. 182. There was a variance between the allegations and the proof, and the court erred in not excluding the proof on motion.—*M. J. & K. C. v. L. Co.*, 48 South. 377. The court should have given the general charge, as requested by defendant, because of the variance, and because a demand and refusal was not shown.—*L. & N. v. Kaufman*, 37 South. Also because a delivery to the carrier amounts to a delivery to the consignee and divests the shipper of title to the goods.—*Hickey v. McDonald*, 151 Ala. 497; *Pilgren v. State*, 71 Ala. 368. After such a delivery the shipper has no right except the right of stoppage in transitu.—52 Ala. 752; 103 Ala. 671; 6 Cyc. 473; 110 Mass. 26; 156 Fed. 987; 27 Mo. App. 360; 15 Pa. Sup. Ct. 435. Special attention is called in this connection to the case of *W. U. T. Co. v. Myer*, 61 Ala. 158.

WALTON H. HILL, for appellee. The plea was demurrable as violative of sec 5546, Code 1907, and also because the action was trover, and the plea attempted to set up a stipulation contained in an alleged contract.—*L. & N. v. Price*, 159 Ala. 213. The filing of the complaint was a sufficient filing of the claim to be presented, as it was filed within the time required for the filing of such claim for damages.—*Floyd v. Clayton*, 67 Ala. 265; *Jones v. Lightfoot*, 10 Ala. 17. The carrier was bound to deliver to the particular firm or corporation to which the shipment was made.—*Ex. Co. v. Shearer*, 37 L. R. A. 177; Hutchinson on Carriers, sec.

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344; *Am. Ex. Co. v. Fletcher*, 25 Ind. 493; see also *Am. Rep.* 107; 10 *Am. Rep.* 475; 67 *Ill.* 348.

SIMPSON, J.—The facts of the case, and the matter referred to this court, are distinctly stated in the certificate of the Court of Appeals.

The law in regard to the responsibility of the carrier to deliver goods, entrusted to it, to the person to whom they are addressed, is very stringent, and necessarily follows from the nature of the business of a common carrier. "No circumstance of fraud, imposition or mistake will excuse the common carrier from the responsibility for a delivery to the wrong person. The law exacts from him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistake in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person to whom the goods were not directed or consigned. If therefore the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity."—2 *Hutchinson on Carriers* (3d Ed.), sec. 668, pp. 739-40.

The cases are numerous, in which an imposter addressed orders to the consignor, falsely representing himself to be some firm in existence, or some fictitious firm, and in accordance with the order the goods were shipped to said real or supposed firm, and the courts have held, in accordance with the fundamental principles of law of carriers, that the carrier was liable for not ascertaining the proper party to whom the goods

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were addressed and delivering them accordingly, or, if the party could not be found, holding the goods subject to the order of the shipper.—2 Hutchinson on Carriers (3rd ed), Secs. 669-672, and notes; *Pacific Express Co. v. Shearer*, (160 Ill., 215), 37 L. R. A., 177, 184, and notes.

In the case of *American Express Co. v. Fletcher et al.* (25 Ind., 492), although the agent of the Express Company was also the agent of the Telegraph Company, and the goods were sent in response to a telegram sent through his office by the imposter, the carrier was held responsible for delivering the goods to said imposter, the court saying "that the package had been sent in response to a telegram purporting to be from J. O. R., simply proved that said R. had credit, . . . not that the person who sent the dispatch or that any man pretending to be him was to receive it." (p. 494).

So where a person assuming the name of another, telegraphed, in the name of such other—V. M.—to a bank to send him \$500.00 and the amount was sent by express, addressed to said V. M., and although the hotel keeper appeared with the imposter and stated that "he (V. M.) is here now," the company was held liable, the court saying: "It is the settled doctrine of England and of this country that there must be an actual delivery to the proper person at his residence or place of business, to his number, or to the party in whose care addressed, and in no other way can the carrier discharge his responsibility, except by proving that he has performed such engagement or has been excused from the performance of it, or prevented by the act of God or a public enemy."—*Southern Express Co. v. Van Meter*, (17 Fla., 783), 35 Am. Rep., 107, 109-10.

It is true that there are cases where the margin between liability and non-liability is so closely drawn

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that it is difficult to draw the distinction, and it must be acknowledged also that there are some cases in conflict with the great weight of authority. In the case of *Samuel v. Cheney* (135 Mass., 278), 46 Am. Rep., 467, there were two persons in the town, each having a place of business under the name of 'A. Swannick,' although it seems to be admitted that one of them was a swindler, yet one of them (the swindler) designated himself by giving his post-office box as 1595. This was the person with whom the seller corresponded and to whom the goods were addressed. In other words, the goods were delivered, in accordance with the address, to the person to whom they were sold, though the seller supposed he was the responsible man.

In the case of *Edmunds v. Merchants' Transportation Co.*, 135 Mass., 283, two cases were tried together. In the first, A. represented himself to be P., a reputable merchant of D., and bought the goods personally, and the court said that as the seller intended to sell to the person who was present before him and did sell to him, so that the title to the goods passed to the person before him, though he thought him to be another, the carrier was held not liable for delivering to him.

In the other case "the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape, of D., buying for him," so that "the relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the goods to the real owner" (pp. 284-5).

In the case of *Dunbar v. Boston & R. Co.*, (110 Mass., 26), 14 Am. Rep., 576 (which we do not mean to

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approve,) the goods were bought by the swindler (G), in person, giving a fictitious name (Y). There was no such person as Y, and the carrier was held not liable as the goods reached the person to whom they were sold.

Mr. Hutchinson draws the distinction between these and other cases, shows that the *Cheney Case* "has been qualified even by those courts which recognize that case as enunciating a correct principle of law," then cites the *Shearer Case* (*supra*) with approval (Secs. 672-3), and after recognizing the undenied principle that the owner shipping the goods may be responsible where he misleads the carrier, winds up the discussion thus:

"It will thus be seen that no possible circumstances of fraud, imposition or mistake, causing the delivery to the wrong person, which have not been induced by the conduct of the owner of the goods, or in which he has not participated, will, at least according to the American cases upon the subject, excuse the carrier from liability for the value of the goods if they are thereby lost, and that when the owner of the goods has been made the dupe of an artifice which has induced him to pursue a course in reference to them which has led to the delivery by the carrier to an improper person who was not really entitled to them, the carrier will nevertheless be responsible for the loss thereby occasioned, where he has been guilty of negligence, but in some jurisdictions not where, in good faith, he has delivered to the person to whom the owner actually directed the good, although the owner may have been misled." (Sec. 679, p. 758.)

Judge Elliott, after noting the various cases, mentions the only exceptions to the absolute liability of the carrier for a wrong delivery, as "if the misdelivery is caused by misdirection or other negligence on the part

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of the shipper, or if fraud is perpetrated on him by a third person in such a manner that he really parts with the title to the goods to such third person, the carrier, rightfully acting on the faith of appearances which the owner himself has created, and in accordance with his directions, and without negligence, ought not to be held liable to him for delivering the goods to such third person, although the owner was imposed on by him."—4 Elliott on Railroads (2nd ed.), Sec. 1526 a, pp.257-8.)

The case of *Western Union Telegraph Company v. Meyer*, 61 Ala. 159, decided by a divided court, with no argument in favor of the majority, is based upon the facts that a swindler, personating another, telegraphed for money and the money came by telegraphic order through the offices of the defendant, in response to his telegram. The majority of the court thought there was "nothing to create suspicion in the minds of the company's agents."

It is unnecessary to decide whether the case in our own court, just cited, is sound law or not, as the case now before the court does not come within any of the exceptions which are held to relieve the carrier. The ring was simply delivered to the carrier addressed, not to J. T. Barber but to "W. H. Barber & Co." There is no evidence that the plaintiffs did or said anything to lead the carrier to believe that the ring was to be delivered to anyone other than W. H. Barber & Co. There is no evidence that the carrier even knew that the man in Samson had written for the ring at all; nor was the order sent through defendant and the response by the same channel, as in the *Meyer Case*. In short it was simply an ordinary shipment to W. H. Barber & Co., without any particular facts or circumstances about it, brought to the attention of the agent of the carrier, who knew that, up to that time there had been no firm of

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that name in Samson; and although the man told him that he was a stranger, just arrived there, and had no way to identify himself except by exhibiting the outside of eight or ten letters, or the envelopes, addressed to W. H. Barber & Co., at Samson, Alabama, postmarked, *Brewton, Alabama*, and although the man suggested to him to inquire of the hotel keeper, he made no further inquiries, and delivered the goods to the imposter.

The facts being without conflict, the defendant was not entitled to the general charge, nor was the defendant entitled to the other charge requested, to-wit: "The court charges the jury that if they believe from the evidence that the defendant had the right to assume the shipment was made on a *bona fide* order, and delivered the goods to the party who made the order, plaintiff cannot recover."

This charge, while being otherwise faulty, according to the principles of law stated, was abstract and misleading, as there was no evidence tending to show that any facts were presented to the agent, from which he would have a "right to assume that the shipment was made on a *bona fide* order" nor that the goods were delivered "to the party who made the order."

All the Justices concur, except DOWDELL, C. J., not sitting.

[Bickley v. Hays.]

Bickley v. Hays.*Bill to Redeem.*

(Decided June 12, 1913. 62 South. 767.)

Equity; Bill; Demurrer; Appeal.—Where a demurrer is sustained to a bill, but the bill is not dismissed, an appeal must be taken therefrom within 30 days as required by section 2838, Code 1907, and an appeal taken therefrom more than 30 days after the enrollment of such decree confers no jurisdiction on this court to review said appeal, and it will be dismissed.

APPEAL from Colbert Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by E. L. Bickley against Arthur Hays. From a decree sustaining demurrers to the bill complainant appeals. Appeal dismissed.

PAUL HODGES, for appellant. Counsel discuss the questions raised by the demurrer to the bill with citation of authority in support of his contentions, but in view of the opinion, it is not deemed necessary to here set them out.

JOS. H. NATHAN, for appellee. The appeal is governed by section 2838, Code 1907, and not having been taken within 30 days from the decree, confers no jurisdiction on this court, and the appeal should be dismissed.—*Dennis v. Curry*, 142 Ala. 637, and cases cited.

ANDERSON, J.—This appeal was taken by the complainant from a decree of the chancellor sustaining a demurrer to the bill of complaint, but the bill was not dismissed, and said appeal is controlled by section 2838 of the Code of 1907. This section, which gives the right of appeal in such cases, requires that the appeal be

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taken within 30 days from the rendition of the decree. The decree was rendered February 20, 1913, and the appeal was not taken until April 1, 1913, more than thirty days thereafter, and this court is without jurisdiction to entertain said appeal, which is accordingly dismissed.—*Dennis v. Currie*, 142 Ala. 637, 38 South. 802; *Blackburn v. H. Mfg. Co.*, 135 Ala. 598, 33 South. 160; *Lide v. Park*. 132 Ala. 222, 31 South. 360.

Appeal dismissed.

DOWDELL. C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Hale v. Tennessee Coal, Iron & R. R. Co.

Bill to Quiet Title.

(Decided June 19, 1913. 62 South. 783.)

1. *Adverse Possession; Extent of; Color.*—The doctrine of the extension of possession to the confines of that described in the color of title is predicated only on the actual possession of a part, at least, of the land described; and an instrument otherwise ineffectual affords color of title only to the land described therein.

2. *Appeal and Error; Record; Matters Not Included.*—Where witnesses testified as to the location of a fence by reference to maps made exhibits to their depositions, the Chancellor's conclusion on the facts cannot be reviewed where the maps are not set out in the transcript.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Bill by Hugh K. Hale against the Tennessee Coal, Iron & Railroad Company to quiet title to certain lands. Decree for respondent and complainant appeals. Affirmed.

CARMICHAEL & WINN, for appellant. Under the evidence, appellant had so used the land as to have ac-

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quired title thereto by adverse possession, and the court erred in the judgment rendered.—*Goodson v. Brothers*, 111 Ala. 589; *Brand v. U. S. Car Co.*, 128 Ala. 579; *Owen v. Moren*, 52 South. 527; 1 Cyc. 983, et seq, and cases cited; 157 Ala. 23. The case of *Rucker v. Jackson*, relied on by appellee is without application to the case made here.

PERCY, BENNERS & BURR, for appellee. The question raised by appellant as to the allowance by the court of an amendment setting up a deed acquired by appellee after the filing of the suit, is settled adversely to him in the case of *Rucker v. Jackson*, 60 South. 137. No such possession was shown of the land either actually or under color of title, as to authorize the relief prayed for.—*Chastang v. Chastang*, 141 Ala. 463; *McDaniel v. Sloss-Sheffield*, 152 Ala. 414; *Lyon v. Arndt*, 142 Ala. 486; *White v. Cotner*, 54 South. 114; *Holland v. Coleman*, 50 South. 128; *Vanderbilt v. So. Min. L. Co.*, 51 South. 983.

MCCLELLAN, J.—This bill was filed by the appellant against the appellee, and invoked the jurisdiction of equity to determine the title, claim, etc., of respondent, to 12 acres of land in Jefferson county.—Code, §§ 5443-5448.

After the respondent had answered propounding its claim (Code, § 5445), it sought to amend, and was so permitted by the court, its answer by adding thereto the description of conveyances (to the respondent) which were executed subsequent to the filing of this bill. The complainant moved the court to strike the amendment to the answer, for that it introduced in assertion or justification of respondent's claim of title conveyances executed subsequent to the filing of the bill.

[Hale v. Tennessee Coal, Iron & R. R. Co.]

The office and object of proceedings of this character is to determine the status of right or claim at the time the decree is rendered; and, in consequence, the motion to strike was properly overruled.—*Rucker v. Jackson*, 180 Ala. 109, 60 South. 139.

The respondent claimed title through conveyances leading from it back to the government. As appears, the record title was in it. The complainant relied on adverse possession. A controlling question of fact before the primary court was whether the complainant's old fence enclosed *a part* of the 12 acres in controversy; and, if so, his color of title, under which he avows he claimed, would extend his possession to the area described in his color of title. So a vital element of the issue before stated was whether the stated inclosure actually embraced land within the call of the instrument relied on as color of title. An instrument, otherwise ineffectual, can only afford color of title to lands described in it; and the doctrine of extension of the possession to the confines of that described can only be predicated on an actual possession of a part, at least, of the land so described.

The evidence upon the issue stated was in immediate conflict. In the deposition of Joy and Miller, witnesses for respondent in whose favor the court pronounced, they appear to have testified at length with reference to a map showing the survey of the land in this relation and the location of the important line. This map was made an exhibit (Z) to the deposition of Joy. Another map, referred to in the testimony of the witness Strickland, appears to have been made Exhibit A thereto. In the state of the issue these maps were, necessarily, important in the solution thereof. The submission in the primary court made these maps or diagrams evi-

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dence to be considered. Neither of these maps appears in this transcript.

Where, as here, it affirmatively appears that there was evidence before the chancellor which is not set out in the record in this court, the conclusion of the chancellor on the facts cannot be reviewed.—*Jefferson v. Sadler*, 155 Ala. 537, 46 South, 969.

If the contest is considered without reference to the factor introduced by the claim of possession under color of title, the evidence is insufficient to show possession pedis of any definite particular part, or the whole of the 12 acres described in the bill.—*Bowles v. Lowery*, 181 Ala. 603, 62 South. 107. The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

Tilley, et al. v. Barnes.

Bill to Remove Administration and to Construe Will.

(Decided May 22, 1918. 62 South. 761.)

1. *Wills; Constructions; Powers.*—The will considered and it is held that under it the widow of testator had the power to sell the home place for the purpose of purchasing another place on which to live, but that she had no power to sell any of the other property mentioned in the will unless advised so to do by the sons, daughters and sons-in-law mentioned in said will.

2. *Same.*—Should the widow sell the home place, and invest the proceeds in another place in which to live, she would be entitled to the use for her life of any surplus received from the sale of the home place remaining after reinvestment in such other place.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

[Tilley, et al. v. Barnes.]

Bill by Ethel R. Barnes against J. S. Tilley and others to remove administration from the probate to the chancery court and to construe the will of Justice M. Barnes, deceased. From a decree of removal and construing the will, the guardian ad litem of the minors appeal. Affirmed.

Codicil No. 2 is as follows: "Codicil No. 1 is by Codicil No. 2 made null and void. In case of my death, my wife E. R. Barnes is with the advice of my sons E. R. Barnes and J. R. Barnes, my daughters, M. C. and L. L. Barnes, my sons-in-law J. J. Campbell and M. J. Bray, empowered to sell all property that I have that she sees fit. Take one-third of the proceeds, invest it in income producing property realty and live upon the income. She is authorized to sell the home near Montgomery and buy a cheaper place, or keep it as she sees fit. At her death said property is to be divided equally among all my children including John Potts Barnes, who is not mentioned in the body of this will. The other two-thirds is to be invested in income producing realty, and apportioned to each of my children. This property shall be governed by section 8 of this will. Elly R. Barnes shall be charged with the amount of money he has that belongs to the estate of Eugene L. Watkins, amount about \$1,800, with interest. All parts of this will in force except what conflicts with the provision of this will.'

Section 8 of the will is as follows: "No land passing from my estate to my heirs shall be sold by them except to pay for land already purchased which shall come under the provisions of this my will.'

The chancellor decreed that item 8 of the original will was of no effect, and that the wife was entitled to the use of the home place occupied by the family of the testator in Cloverdale so long as she lives, and that she

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has the power to sell the same and use the proceeds in the purchase of another place to live and to use the surplus proceeds or the income therefrom during life, and that at her death said homestead or any property or money or other thing of value into which she has converted the same shall be the property of the children or descendants of the children of the said testator that shall then be living; and the wife is also entitled to the use during her natural life of one-third of all other property belonging to the testator at the time of his death, whether remaining in its present form or converted into other property, and that at her death the same shall become the property jointly of such children or descendants of children of the said J. M. Barnes as shall then be living per stirpes. The two-thirds remaining is decreed to belong jointly and equally to the children left by said testator; and that the power of sale given to the wife, other than the home place, is not imperative but discretionary in the first place with her as to time, place, and terms, and she has no power to make any sale of such property unless advised to do so by all of said two sons, two daughters, and two sons-in-law, and that, unless with their advice she sell all of said property within a reasonable time, then any adult child of said testator may demand an apportionment of his or her share of any of said property that has not been so sold and reinvested in accordance with the will.

J. S. TILLEY, *pro se*. Counsel insists that the court was in error in decreeing a removal, and in its construction of the will, but he cites no authority in support thereof.

RUSHTON, WILLIAMS & CRENSHAW, for appellee. There was no error in the decree as it followed the plain provisions of the will.

[Tilley, et al. v. Barnes.]

MAYFIELD, J.—This is a bill by a trustee named in the will to remove the proceedings as to the administration of the estate from the probate into the chancery court for the purpose of having the court construe the will and the codicils thereof. The court entertained the bill and ordered the administration removed into the chancery court or into the city court having chancery jurisdiction and proceeded to construe certain parts of the will and codicils.

Some of the heirs, who are also legatees and devisees, were minors, and a guardian ad litem was appointed to defend for them in the court below; and from the decree in the lower court these prosecute this appeal and assign and insist upon error in that decree in the following particulars:

First, that the court had acquired no jurisdiction; second, that the trustee (appellee here), who was the wife of the testator, had the right, under the will, to sell the home place without the advice of certain persons named in the will whose advice was required as to the disposition of property other than the home place; third, that said trustee and widow had no right to use for life the surplus, in the event of a sale by her of the home place; fourth, that the will was rendered void for uncertainty by reason of two codicils thereto; fifth, that it was not intended by codicil No. 2 of the will to make the sale of the property other than the home place, mentioned in the will, by the trustee, depend upon the consent of the persons named in the codicil; that it was intended only that the trustee might confer with such parties named as to the sale and not that their consent should be a condition precedent to such sale.

It is only in these respects that there is any insistence as to error; and hence we consider and review the de-

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cree only in so far as it is necessary to pass upon the questions indicated.

We are of the opinion that the lower court unquestionably acquired jurisdiction to construe the will, and that it is certainly not void in toto and was not rendered so by the codicil mentioned. We are also of the opinion that the will authorized the trustee to sell the home place and other property on the conditions, in the mode, and for the purposes mentioned in the decree of the chancellor, and that the widow was entitled to the use, for her life, of any surplus that might remain after the sale of the home place and reinvestment in another home as decreed by the chancellor.

We find no error in the decree in the matters complained of on this appeal; and it would be improper and untimely for us to attempt to pass upon questions not insisted upon by the appellant on the appeal.

It therefore follows that, in so far as this appeal is concerned, the decree will be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, JJ., concur.

Watson v. Appleton.

Bill to Enforce Vendor's Lien.

(Decided May 13, 1913. 62 South. 765.)

1. *Witnesses; Competency; Payment.*—Where the suit was by an administratrix to enforce a vendor's lien alleged to have been held by her intestate neither the administratrix nor the purchaser is competent under the statute to testify to transactions with or statements by such intestate regarding payments claimed to have been made by the purchaser.

[Watson v. Appleton.]

2. *Payment; Application; Priority.*—Where a purchaser of land owed the vendor two unsecured debts which matured prior to the note for the balance of the purchase price of the land, payments made by him to decedent will be applied by the law first to the older debts, in the absence of any competent evidence to show that such payments were applied by the parties to any specific debt.

3. *Vendor and Purchaser; Vendor's Lien; Payment.*—The evidence examined and held not sufficient to show that the purchaser made a certain payment to the vendor in his lifetime which the purchaser claimed to have made.

APPEAL from DeKalb Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Emma Watson as administratrix against A. B. Appleton to enforce a vendor's lien on certain lands sold by complainant's intestate. From a decree rendered for a less amount than that claimed complainant appeals. Reversed and rendered.

ISBELL & SCOTT, for appellant. Neither appellant nor appellee was competent to testify as to transactions with or statements made by decedent in his lifetime concerning the matter here in dispute.—Sec. 4007, Code 1907; 128 Ala. 617. It is a familiar principle that the law applies payment to the older debts in the absence of a specific direction and agreement between the parties, and it follows that the chancellor erred in confirming the report of the Register, and in not sustaining the exceptions thereto.

I. M. PRESSLEY, for appellee. On the authorities cited by appellant the administratrix was not competent to testify as she did in this case. The receipts were prima facie evidence of payment, and the burden was on complainant to show that they were given for other than payments on the note.—19 A. & E. Enc. of Law, 1120-22.

SOMERVILLE, J.—Appellant filed her bill, as administratrix of her deceased husband's estate, to fore-

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close a vendor's lien upon certain land sold by him to respondent; the debt being evidenced by respondent's promissory note for \$600, executed on December 7, 1908, and payable to G. M. Watson on January 15, 1909. Respondent claimed a number of credits based on payments of money and merchandise to the decedent or to complainant, and in stating the account on a reference the register allowed all of the items of credit claimed, aggregating \$451.59, leaving a balance due to complainant of \$286.35. Complainant's exceptions to the register's report were overruled, and the chancellor in his final decree confirmed the report allowing these credits and fixing the indebtedness of respondent at the sum stated. In stating the account the register evidently did no more than compile the several items of credit substantially as claimed by respondent, and strike a balance on that basis.

The testimony of both complainant and respondent with respect to transactions with or statements by the decedent affecting his estate was, of course, incompetent under our statute, and should have been disregarded.

It appears from legal testimony that respondent originally owed the defendant \$600 on the note, due in January, 1909, that he owed decedent \$150 for land rent in 1907 or 1908, and that some time previously he owed decedent \$40 for a wagon. Complainant admits that the sums of \$10 and \$45 were paid on the note, and admits, also, that respondent paid to decedent or herself during 1909 and 1910 money and merchandise amounting to \$125. In addition to this, it appears from the testimony of respondent's brother that respondent paid \$60 to decedent in February, 1911. There is no legal evidence to show that any of these payments were made on the note, excepting \$28 paid in February, 1909,

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and receipted for by complainant in decedent's name, and for \$10 paid in October, 1909, and receipted for by complainant in her own name. Nor is there any legal evidence to show that the debts due from respondent to decedent for land rent and for the wagon—\$190—were ever paid, unless in whole or in part by the several unapplied items above referred to. Receipts for money are, of course, prima facie evidence of its payment, but the signature of the receiptor must be proved, and by no competent evidence does it appear that decedent ever signed any of these receipts.

To summarize: We find that respondent owed decedent three several debts, those for rent and the wagon being unsecured, and older in point of maturity than the debt secured by the note; that four payments aggregating \$93 were applied to the note by the parties; and that several payments aggregating \$147 were made to decedent on account without specific application by either party. It results that, as to the last amount, the law must make the application. In accordance with settled principles, these unapplied payments will be applied to the older items of indebtedness first.—*Connor v. Armstrong*, 91 Ala. 265, 9 South. 816. Thus applied, they are exhausted without completely satisfying the older unsecured debts, and the debt evidenced by the note is not affected thereby. Complainant therefore shows an indebtedness of \$600 due from respondent on the note on January 15, 1909, with interest from that date, reduced by credit payments as follows: October 1, 1909, \$10; December 11, 1909, \$28; 1910, \$10; April 27, 1911, \$45. Calculated on the basis of annual rests, the balance now due on the note is \$715, and complainant is on the evidence entitled to a decree for that amount.

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We have disallowed the item of \$150 claimed by respondent to have been paid to decedent on February 18, 1911. Respondent's testimony as to this is, of course, incompetent, and it finds support only in the testimony of Joe Watson. This witness indeed says he saw respondent pay \$150 to decedent, but he says he can neither read nor write, and did not count the money. He says decedent wrote out the receipt with a fountain pen; while respondent declares that he himself wrote it out, and signed decedent's name to it. Witness and respondent both say that the transaction took place out in a field where no one else was present—a very unlikely place. Witness admits that complainant had recently attached his crop and taken a judgment against him for \$400, certainly a basis for the existence of hostile bias on his part. Moreover, the testimony of Dr. McWhorter, W. W. Herring, and complainant satisfies us that decedent was confined to his bed on February 18, 1911, and did not leave the house. And, finally, respondent admits that he filed a petition in bankruptcy in 1911, and in that proceeding swore that he owed \$600 on this land, after the time when these payments are alleged to have been made.

This is no less than an admission under oath that nothing had then been paid on the note except the interest, and its significance is overwhelming when it is remembered that the interest on the note up to that time—a little over two years—was about \$100, while the amount we find to have been paid on the note was \$93. Respondent cannot justly complain if this court accepts the verity of his oath delivered *ante litem motam*, rather than his later contradictory claim prompted, we may well assume, by the existence of this litigation.

[Remington Typewriter Co. v. Hall, et al.]

The decree of the chancery court will be reversed as to its finding of the amount due complainant on the note, and a decree will be here rendered for \$715, instead of \$286.35. In all other respects the decree of the lower court will be adopted and followed as the decree of this court.

Reversed and rendered.

ANDERSON, MAYFIELD, SAYRE, and DE GRAFFENRIED,
JJ., concur.

Remington Typewriter Co. v. Hall, et al.

Bill for an Injunction.

(Decided June 30, 1913. 63 South. 74.)

1. *Attachment; Levy; Property in the Hands of the Court.*—Where the sheriff held the property under the levy of an attachment regularly issued by a court of competent jurisdiction, an attempted levy of another attachment upon the same property in the hands of the sheriff without the consent of the court issuing the attachment under which it is held, is void, and creates no lien of any kind upon the property.

2. *Same; Proceeding to Enforce; Equitable Relief.*—Where an attaching creditor has acquired no lien or judgment against a foreign debtor by an attempted attachment, and there is no showing of fraud, he cannot maintain a bill against such attaching party of the property as not being the owner of the property, but must look alone to the attachment statute for his remedy, since the creation of the statutory proceedings by attachment did not create a new jurisdiction for courts of equity, simply by virtue thereof.

APPEAL from Morgan Law and Equity Court.

Heard before Hon. Thomas W. WERT.

Bill by the Remington Typewriter Company against F. W. Hall and others, to enjoin them from selling or procuring for sale of a certain typewriter for the satisfaction of a judgment of said Hall against a foreign

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corporation, and for a decree for sale of same for the satisfaction of the claim and demand of complainant against one Gulley. Decree for respondent and complainant's appeal. Affirmed.

WERT & LYNNE, for appellant. The demurrer was not well taken.—*Reid v. Sprague*, 34 Ala. 101; 4 Cyc. 596, 570. The bill contained equity.—Joyce on Injunctions, secs. 8 and 739. That injunction was the proper remedy, see Joyce on Injunctions, sec. 744.

E. W. GODBEY, for appellee. The deficiency in a creditor's legal remedy to reach his debtor's property, does not necessarily mean that there is a remedy in equity. Only in cases of fraud does equity annul any interference with property of the debtor in the absence of a judgment. A creditor of one whose property rights have been wrongfully invaded has no equitable remedy against the wrong doer. And this is true notwithstanding the non residence or insolvency of one of the parties.—*Holmes v. Millage*, (1893), 1 Q. B. 551, 10 Eng. Ruling Cases, 604, 608; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275, Code of 1907, sec. 3739; *Building & Painters Supply Co. v. First National Bank*, 26 South. 311, 123 Ala. 203; *Savage v. Johnson*, 28 South. 547; *Turrentine v. Koopman*, 124 Ala. 211, 27 South. 523; *Redd v. Wallace*, 40 South. 407; *Hall v. Ala. Term. & Imp. Co.*, 143 Ala. 464, 2 L. R. A. (N. S.) 130; *Meyerovitz v. Glaser*, 31 South. 360; *Sanders & McLaughlin v. Watson*, 14 Ala. 198; *Phillips v. Ash, etc.*, 63 Ala. 414; *Williams v. Dismukes*, 17 South. 620; *Stanton v. Heard*, 14 South. 360, 100 Ala. 515; *Thurber v. Blanck*, 50 N. Y. 80; *Smith v. Moore*, 35 Ala. 76; *Reese & Heylin v. Bradford*, 13 Ala. 837; *Chambers v. Chambers*, 13 South. 674, 98 Ala. 454.

[Remington Typewriter Co. v. Hall, et al.]

DE GRAFFENRIED, J.—The facts are that on January 9, 1909, the complainant, the Remington Typewriter Company, sold to R. H. Gulley, one of the respondent's to the bill of complaint, a typewriter. Gulley paid a part of the purchase money of the typewriter in cash and gave notes for the balance. When Gulley bought the typewriter, he was living at New Decatur, and was working for the Cotton Growers' Industrial Company as its general manager. The Cotton Growers' Industrial Company seems to be a foreign corporation, and is domiciled in the state of Illinois. When Gulley bought the typewriter, the Cotton Growers' Industrial Company had an office in New Decatur, in which was a lot of office furniture belonging to the company. Gulley took the typewriter into this office, and until he left the state kept it there and conducted his correspondence as manager of said corporation upon it. On the 9th day of July, 1909, all of the property in said office, including said typewriter, was regularly attached by the sheriff of Morgan county in an attachment proceeding which had been regularly and validly instituted by one Hall against the said Cotton Growers' Industrial Company in the Morgan county law and equity court for the collection of an indebtedness of \$500 which was owing the said Hall by the said Cotton Growers' Industrial Company. All of this property, including the typewriter, was attached as the property of the Cotton Growers' Industrial Company for the satisfaction of the said debt. When, therefore, the sheriff of Morgan county, acting as an officer of the law and equity court of Morgan county, levied upon said property and took it into his possession under said writ of attachment, all of said property, including said typewriter, *went into the possession of the law.*

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About the time of the above levy Gulley also left the state, and thereupon the complainant, two or three days after the above levy, sued out an attachment before and returnable to a justice of the peace, against said Gulley, for the balance due it on the purchase money of the typewriter. The typewriter is the only property in the state which belongs to Gulley, and the above-described office furniture is all of the property in the state which belongs to the Cotton Growers' Industrial Company. After complainant commenced its attachment proceedings against Gulley, the writ of attachment was placed in the hands of a constable, and that constable, having seen the sheriff, and after having been shown the typewriter by the sheriff, made, with the consent of the sheriff, a return of complainant's writ of attachment to the court which had issued it, with the statement indorsed thereon that it had been levied on the typewriter as the property of the said Gulley. The typewriter, however, remained where it belonged, viz., in the possession of the sheriff, who had siezed it under the writ of attachment in his hands. The complainant thereupon, acting upon the assumption that its writ of attachment had been validly levied upon the typewriter, moved for and obtained a judgment against the said Gulley, and the justice of the peace, when he entered up the judgment, made an order that the typewriter be sold for its satisfaction. The sheriff, however, refused to turn the typewriter over to the constable; and the result is that the typewriter has never been sold under the above order, but yet remains in the hands of the sheriff.

After the above occurrence the said Hall obtained a judgment against the said Cotton Growers' Industrial Company, in his attachment proceeding against said company; and the said property so levied upon by the

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sheriff in said attachment proceeding of Hall against the said Cotton Growers' Industrial Company, including said typewriter, was by the court condemned to be sold, and ordered to be sold, for the satisfaction of said judgment.

Thereupon the complainant, the Remington Typewriter Company, filed this bill of complaint against the said Hall, E. W. Godbey, his attorney in said attachment proceeding against the Cotton Growers' Industrial Company, Thomas R. Shipp, the sheriff who made the levy and who has the typewriter in his possession, and the said Cotton Growers' Industrial Company, and prayed, among other things, "that the said Frank W. Hall, E. W. Godbey, and Thos. R. Shipp, as sheriff as aforesaid, and each of them, be enjoined and restrained by order and decree from selling or procuring sold the said Remington typewriter described in complainant's bill hereinabove, on January 15, 1910, as advertised, and from selling or procuring the sale of said typewriter for the satisfaction of any portion of the judgment and demand of the said Frank W. Hall against the said Cotton Growers' Industrial Company; that upon final hearing of this cause the said injunction and restraining order be made perpetual, and the said Frank W. Hall, E. W. Godbey, and Thos. R. Shipp, as sheriff aforesaid, be forever restrained and enjoined from interfering or intermeddling in any way with the said typewriter, and from making sale thereof or causing sale to be made for the purpose of satisfying any part of said Hall's demand against said Cotton Growers' Industrial Company; that the court adjudge and decree that the said typewriter is no part of the estate or effects of the Cotton Growers' Industrial Company, and that it is the property of the defendant R. H. Gullett, and that said typewriter be ordered and decreed

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sold for the satisfaction of the claim and demand of this complainant against the defendant R. H. Gulley; and this complainant prays for all other, further, additional and different relief to which it may be entitled."

1. The attempted levy, by the constable, of the writ of attachment of the Typewriter Company upon the typewriter after the writ of attachment of Hall against the Cotton Growers' Industrial Company had been levied upon it by the sheriff, and while that typewriter was in the possession of the sheriff under said writ, was abortive. The typewriter was then in *gremio legis*, the attempted levy was made without the *consent* of the court which was then in possession of the typewriter, and the alleged levy by the constable was therefore null and void. The sheriff was without power to consent to the levy, in the absence of the consent of the court having, through him, as its officer, the possession of the typewriter.—*Rives v. Wilborne*, 6 Ala. 45; *Langdon v. Brumby*, 7 Ala. 53; *Williams v. Dismukes*, 106 Ala. 402, 17 South. 621. It follows, therefore, that the complainant's attachment proceeding has given it no lien of any sort upon the typewriter.

2. "Attachment proceedings are purely statutory and operate only upon the legal rights of parties."—*Henderson v. Ala. Co.*, 72 Ala. 32; 2 Mayfield's Digest, p. 269, subd. 2. An attachment against a *nonresident* of this state is in the nature of a proceeding in rem, and a judgment rendered in such a proceeding affects only the property attached, unless, in some way, *personal* service is legally obtained upon such nonresident and proper notice of the pendency of the proceeding is given to such nonresident, or there is a personal appearance of such nonresident in said case before the judgment is actually rendered.—*Exchange National Bank of Spok-*

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anc v. Clement, 109 Ala. 270, 19 South. 814. In an attachment proceeding against a nonresident, there can, therefore—unless there is a voluntary appearance of the nonresident in the cause, or unless, in some legal way, personal service of a summons and complaint in said cause is obtained upon such nonresident for a sufficient period before the day set for the trial to authorize a judgment to be taken against him which shall bind him personally—be no judgment taken in said cause unless there is a *valid levy* of the writ of attachment. Such a judgment is binding only upon the rem—the thing attached—and when there has been no valid levy of the attachment upon *anything*, no judgment of any sort can be rendered.

In the instant case there has been no levy, and there is therefore no lien. As there has been no levy, there is therefore no judgment. The complainant is therefore in the same position it would have been in if there had been no attempted levy by the constable upon the typewriter and no attempted proceedings in its attachment suit after such attempted levy by the constable.—*Exchange National Bank of Spokane v. Clement, supra*.

3. The complainant is, then, in this position: It has sued out an attachment against a nonresident. The suing out of that attachment has given it neither a *judgment* against the nonresident nor a *lien* upon any property belonging to that nonresident. It is, at best, a simple contract creditor of a nonresident. It claims that the law and equity court of Morgan county has in its possession a typewriter which, by virtue of a legal proceeding now pending in that court, went into the custody of that court. It appeals to a court of equity to require the law and equity court of Morgan county to *turn that property loose* in order that *another court* may take possession of it.

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A proceeding by attachment is a statutory proceeding. It was unknown to the *common law*, and through this *statutory* proceeding there has not been, simply by virtue of its statutory creation a *new* jurisdiction thereby created for courts of equity. The principles of the common law and the principles of equity were developed together, side by side—the one complement to the other, the one an aid to the other, and, in many well-defined cases, the one to supply the deficiencies of the other—but our statutory system of attachments was created by our Legislature because *neither* courts of *law* nor courts of *equity* provided the needed *remedies* for the mischiefs intended to be remedied. In an attachment proceeding, *after* the plaintiff has acquired a *lien*, or when there has been *actual fraud*, a court of equity, by virtue of its *general jurisdiction* in matters of *liens*, or of *fraud*, might, in a *proper* case, come to the aid of a plaintiff *before* or after judgment—matters which are not before us and which we do not, of course, decide—but in this proceeding the complainant, with neither a *lien* nor a *judgment*, and with no fact showing *fraud*, must look alone to the statutes which created the *remedy* which he has invoked—*Sanders & McLaughlin v. Watson*, 14 Ala. 198; *Reese v. Bradford*, 13 Ala. 845; *Smith v. Moore*, 35 Ala. 76.

The bill of complaint is without equity. The decree of the court below, dismissing the complainant's bill, is for this reason affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

[Bell v. Burkhalter, et al.]

Bell v. Burkhalter, et al.

Bill to Declare Deed Void and to Remove as Cloud on Title.

(Decided May 13, 1913. Rehearing denied June 19, 1913.
62 South. 786.)

1. *Equity; Pleading; Bill.*—While rule 10 of Chancery Practice provides that bills shall not contain blanks a bill will not be stricken because the year of the death of the predecessor in title of complainants was left blank; the bill showing that the exact date of her death was immaterial.

2. *Infants; Right to Maintain Action; Waiver of Objection.*—Where the action was instituted in the name of the infant without the intervention of a guardian or next friend, and pending the litigation, the infant arrived at the age of majority and thereafter, by his conduct in the cause, manifests an adoption or ratification of the action so commenced, the objection cannot be made that he was an infant when the action was begun.

3. *Same; Married Women; Disabilities.*—Under the provisions of section 4499, Code 1907, an allegation that an infant plaintiff at the age of eighteen years was married in this state, sufficiently shows her right to maintain the action without the interposition of a guardian or next friend.

APPEAL from Pickens Chancery Court.

Heard before HON. THOMAS H. SMITH.

Bill by Judy Burkhalter and others against A. E. Bell, to declare a deed void and for removal as cloud on title. For a further statement of the bill see *Bell v. Burkhalter*, 176 Ala. 62; 57 South. 460. From a decree for complainant, respondent appeals. Affirmed.

JONES & PERSONS, for appellant. The bill contained a blank and the motion to strike should have been granted.—Rule 10, Ch. Ct. Pr. The respondent's demurrer to the amended bill of complaint should have been overruled—*Tillman v. Thomas*, 87 Ala. 321; Sec. 4499, Code 1907; *Hays v. Bowdoin*, 159 Ala. 600.

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D. D. PATTON, and JOHN S. STONE, for appellee. The averments of the bill show that complainants are the heirs at law of their predecessors in title, and that the date of the death of their predecessors is immaterial. Hence, although rule 10 provides that bills shall not contain blanks, the reason of the rule does not require a dismissal of the bill. The infancy of complainant must be specially pleaded, but in view of the fact that after attaining her majority, complainant ratified the filing of the bill, and prosecuted the case, was a sufficient answer to the fact of minority. In any event, it must be pleaded in abatement, and is not a defense in bar of the action.—*Howland v. Wallace*, 81 Ala. 238; *Thompson v. Gray*, 84 Ala. 559; *Griffith v. Ventress*, 91 Ala. 366; *Hibble v. Sproull*, 71 Ala. 50.

McCLELLAN, J.—The statement of and consideration given this cause on former appeal may be found in 57 South. 460. The applicable substantive law sustaining the complainant's right will not be reiterated. After the return of the cause to the court below the bill was amended by the incorporation therein of averments leading to the partition of the land or its sale for division. Demurrers were sustained to the bill as it then stood. Subsequently the bill was amended by the substitution of the present bill, which is, as at first and as stated in 176 Ala. 62, 57 South. 460, a bill to cancel certain conveyances, restrain waste, and effect an accounting for timber cut by respondent (appellant) from the lands described.

In reliance upon rule 10 of chancery practice, the respondent moved to strike the bill because it contained a blank. The "blank" consists in this: In averring the death of Elvira Brown, whose heirs at law complainants are (among others), it is alleged she "died in, to-

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wit, the year 190—.” In view of the averments of the whole substituted bill, its nature and objects, the allegation of the exact year of her death was not important, indeed was immaterial. While pleading should not, as rule 10 contemplates, contain blanks, and solicitors should avoid them in every instance, we do not think the rule intends that an omission of the immaterial character here present should draw upon the bill the entirely disproportionate penalty of striking the bill from the file. The chancellor denied the motion; and, under the circumstances indicated, his conclusion will not be disturbed.

Among the complainants is Lutera Brown. In the substituted bill, following exactly this feature of the original bill, these averments occur: “That Lutera Brown became 18 years of age on the 25th day of March, 1908, and was married some time prior to that time and now resides with her husband near Tupelo, Lee county, Miss.” The original bill was filed August 11, 1908. The substituted bill was allowed and filed July 29, 1912. It thus appears, as a necessary result from the age of Lutera Brown expressly averred in the substituted bill, that she became 21 years of age on March 28, 1911, being 18 on that day in the year 1908. The demurrer to the substituted bill was filed September 10, 1912, more than a year after Lutera Brown had become 21 years of age.

Where an action is instituted in the name of an infant, without the intervention of a guardian or next friend, and pending the litigation the infant attains his majority and thereafter manifests by his conduct in the cause, even through an attorney, an adoption or ratification of the action so erroneously commenced, the subsequent objection that he was an infant when the action was instituted cannot avail the objector. In such cir-

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cumstances the objector must allege and prove, to abate the action so erroneously originally commenced, that the party, subject to disability when the action was commenced, has *not* adopted and ratified such commencement of the action.—*Germain v. Sheehan*, 25 Minn. 338; 14 Ency. Pl. & Pr. pp. 1000, 1001; 22 Cyc. pp. 671, 672. Accordingly these grounds of the demurrer objecting to the *substituted* bill on account of Lutera Brown's infancy were not apt and were properly overruled.

If the allegation of the original, or the substituted, bill had been that Lutera's marriage was solemnized in *this state*, Code, § 4499, wherein the attainment by a then married woman of the age of 18 years is made effective to bestow upon her all the legal rights of a married woman over 21 years of age, would have been perfectly complied with in this pleading.—*Hayes v. Bowdoin*, 159 Ala. 600, 49 South. 122.

The matters treated are the only ones given particular discussion in brief of solicitors for appellant. The bill, in its substance, has equity, and in common with the chancellor we think it is without defect.

The decree is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[City of Decatur v. Southern Railway Co.]

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Bill to Enjoin Municipal Ordinance.

(Decided June 12, 1913. 62 South. 855.)

1. *Appeal and Error; Questions Presented.*—Where the court overruled a demurrer to the complaint on a specific ground, but did not decree as to other grounds, this court on appeal will only review the rulings on the grounds specified, notwithstanding the intimation by the court that some of the other grounds were well taken.

2. *Municipal Corporations; Special Assessment; Railroad Property; Sale.*—An assessment for street improvement against a small portion of the right of way of a railroad company, engaged in the discharge of its functions as public service corporation, as a going concern, cannot be enforced by a sale of that portion of the right of way.

APPEAL from Morgan Law and Equity Court.

Heard before the Hon THOMAS W. WERT.

Bill by the Southern Railway Company against the City of Decatur to enjoin the enforcement of a municipal ordinance to enforce the sale of a portion of the right of way. From a decree overruling demurrers to the bill respondents appeal. Affirmed.

CALLAHAN & HARRIS, for appellant. Under the allegations of the bill the assessment sought was of a benefit to the abutting property regardless of what its uses may be.—*Ala. R. R. Co. v. Barbour*, 197 U. S. 434. The city council has adjudicated that the property involved was benefited by the improvement, and that that amount had been assessed against it, and in the absence of any showing by the bill to the contrary, it must be presumed that the proceedings were regular.—*City of Birmingham v. Will*, 59 South. 173; *City of Woodlawn v. Durham*, 50 South. 356; Page & Jones Special Assessments, sec. 933. While it may be conceded that the

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policy of the State is not to sell under judicial process, the part of rights of way of a railroad, the legislature can and has changed that policy.—Sec.1370, Code 1907; 77 Am. St. Rep. 711; 120 Ill. 104; Elliott on Railroads, sec. 786; 91 Pac. 244; 28 Cyc. 1118; 12 L. R. A. (N. S.) 112; 10 Ohio State 159; 147 U. S. 202; 34 L. R. A. 564, and authorities supra.

WERT & LYNNE, for appellee. No brief reached the Reporter.

MAYFIELD, J.—Appellee railroad company, filed this bill against the City of Decatur, and some of its officers, to enjoin the enforcement of a certain municipal ordinance, by which the city proposed to sell, and was proceeding to sell, a portion of the railroad's right of way, for the purpose of enforcing the payment of an assessment against the right of way for the opening and improvement of a street of the city which is adjacent to or abutting the railroad right of way. The city demurred to the bill, and the trial court overruled the demurrer. The court, in a short opinion accompanying the decree, states that the demurrer was overruled on the ground that it was against public policy to sell or expose for public sale the right of way of a railroad, whilst it was the property of a public service corporation, engaged in the business of a common carrier; that its right of way for this reason and purpose was a public highway. Whether such quasi public property can be sold at judicial sale, to pay debts or demands due from the corporation, or whether such claims or demands constitute a charge or lien upon the right of way sought to be sold, is the sole question presented for decision on this appeal.

There were other grounds of demurrer, but the trial court did not decree as to them, but intimated that

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some of the grounds were well taken. For this reason we will review the chancellor's rulings only on the ground mentioned.

There is a plain and clear-cut conflict among the authorities as to whether or not the right of way of a railroad company is subject to local assessments, or betterment and improvement taxes. Mr. Elliott, in a recent edition of his work on Railroads, speaks thus on the subject (volume 2 [2d Ed.] §786, pp. 197-200): "There is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment. Some of the authorities hold that the making of a local improvement, such as a street, along or near a railway right of way cannot possibly be a benefit to the company; that it can run its trains as well without the improvement as with it, and therefore no assessment can be levied. One court, addressing itself to this subject, has said: 'Where we can declare as a matter of law no such benefit can arise, the Legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation.' Thus, where a street crosses a railway right of way at right angles, it has been held that no benefit accrues to the railway company from the improvement of the street, and that

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no assessment can be levied. As where a railway company has a mere right of way across a lot to which it does not hold title, it cannot be assessed for the construction of an improvement adjoining the lot. In many of the cases in which it was held that the right of way could not be assessed, the improvement, to pay for which the assessment was sought to be levied, was a street, and it clearly appeared that no benefit resulted to the right of way, but where it clearly appears that a benefit results from the improvement, such as the benefit derived from the construction of a street drain, sewer, or the like, the levy of the assessment may be proper and valid. So it had been held that the fact that the only use made of a lot abutting on a street improvement is for a railroad right of way does not make an assessment thereon invalid on the alleged ground that there can be no benefit" If we concede the "true rule" to be as Mr. Elliott states it (which we do not, at present), still the crucial point in this case is not yet met, which is this: Can the assessment against a small portion of a railroad right of way be enforced in the ordinary mode, by a sale of that small portion so benefited by the assessment?

On this particular question Mr. Elliott says (*idem*, sec. 790): "While it is probably true that there may be a lien on the right of way of a railroad for local assessment, where such assessment is authorized by statute, the manner of enforcing such assessment is not clearly settled. The right of way of a railroad company is a part of the company's property, without which it could not perform the duties it owes to the public. To subject a portion of the right of way to a sale to enforce a local improvement would greatly embarrass, if not entirely destroy, the ability of the company to perform its public functions. The rights of the public are regarded

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as superior to the rights of any individual, or group of individuals. Local assessments are usually levied on a small portion of a railway right of way, varying from a few feet in length to miles in length. To permit such portion to be sold would prevent the operation of the road, and, on grounds of public policy, it is held that the ordinary remedy of enforcing the collection of a local assessment by a sale of the property benefited does not apply to the enforcement of an assessment against the right of way of a railway company. While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and not in broken fragments. 'The public have a right to have a railway remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments.' Even if it be conceded that a personal judgment for the amount of the assessment can be rendered, still it does not follow that a railroad can be sold in fragments.'

While we have no case from this court exactly in point, what has been said on the subject of sales of a part of a railroad right of way clearly indicates that it has always been the opinion, if not the decision, of this court that such sales were unwarranted and against public policy.

In the case of *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 560, 8 South. 25, 27, which was a proceeding to enforce a materialman's lien for water pipes used by the water company, a public utility corporation engaged in supplying water to the city and inhabitants of Eufaula, this court, speaking through McCLELLAN, J., said: "It may be that water companies, and the like, cannot have their public functions thus interfered with, by the enforcement of the lien of a ma-

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terialman by a sale of any part of their property which is essential to the service of the public. Ordinarily the coercive process of the law should run against their property and franchises as an entirety, so that the public interests in them will be conserved. It may readily be conceived that the sale under judicial process of the buildings and machinery which constitute the pumping station of a water company, whose duty it is to supply water to a populous city for its people, for the suppression of fires, and for public sanitation and comfort, might result not only in individual inconvenience, but also in serious public danger and disaster. We expressly refrain, however, from more than a citation of some of the authorities on this point. —*East Ala. Railway Co. v. Visschler*, 114 U. S. 340 [5 Sup. Ct. 869, 29 L. Ed. 136]; *Water Co. v. Hamilton*, 3 Am. & Eng. Corp. Cas. 421, note 425; *Gue v. Tide Water Canal Co.*, 24 How. 257 [16 L. Ed. 635]; *Commissioners v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 11826, 29 L. Ed. 305; *Foster v. Fowler*, 60 Pa. 27; *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465; *Graham v. Mt. Sterling Railway Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412; *La Crosse & Mid. R. R. Co. v. Vanderpool* [11 Wis. 119] 78 Am. Dec. 691, note 697.”

In the case of *Gardner et al. v. Mobile & N. W. R. R. Co.*, 102 Ala. 635, 15 South. 271, 48 Am. St. Rep. 84, which was a bill to set aside and annul a judicial sale of a portion of a railroad right of way, this court, speaking through STONE, C. J., said: “As a general rule, the property of all private corporations is as subject to legal process for the satisfaction of debt as is the property of natural persons. An exception obtains, however, when the corporation is created to serve public purposes charged with public duties, and is in the exercise of its franchise and in the performance of its

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duties. Then, on considerations of public policy, without regard to the nature or quality of the estate or interest of the corporation, according to the weight of authority, such property as is necessary to enable it to discharge its duties to the public, and effectuate the objects of its incorporation, is not subject to execution at law. The only remedy of a judgment creditor is to obtain the appointment of a receiver, and the sequestration of its income or earnings.—1 Freeman on Executions, § 179, and authorities collected in notes; 2 Morawetz, Corp. § 1125; *Gue v. Tidewater Co.*, 24 How. 257 [16 L. Ed. 635]; *Overton Bridge Co. v. Means*, 33 Neb. 857 [51 N. W. 240], 29 Am. St. Rep. 514, and authorities cited.” In the above case the sale was of the fee to the right of way, and it was upheld solely upon the ground that the railroad had ceased to be a going concern, or to discharge its public functions, and was a public service corporation only in name, long before the levy and sale. Further on in that same opinion it is said: “The question we have considered, the right to levy an execution at law, on lands owned and held in fee, as the right of way of a railroad corporation, the corporation having become inert and having ceased all user of its franchises and all performance of its public duties, was not considered in *East Ala. Railway Co. v. Visscher*, 114 U. S. 340 [5 Sup. Ct. 869, 29 L. Ed. 136]. All that was considered and decided in that case was whether the mere right of way of a railroad company, ‘a mere easement in the land, to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor,’ was the subject of levy and sale under execution at law. The court expressly declared that it was ‘not necessary to discuss the general question as to the right to levy an execution at law on property owned by a railroad com-

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pany in fee.' Nor is it now necessary to express an opinion whether under any circumstances the easement of a railroad company may or may not be the subject of levy and sale under execution at law."

The above case was cited with approval in the case of *Connor v. Tenn. Con. Ry.*, 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687, the opinion being written by Judge Lurton, now of the Supreme Court of the United States, in which case it was held that a section of a railroad could not be sold under a decree of court, separate from the franchise, for the purpose of enforcing a contractor's lien. In that case Judge Lurton said: "The general rule is that the physical property of a private corporation is as subject to be sold at judicial sale for the enforcement of a lien, or for the satisfaction of a judgment or decree for debt, as the property of an individual. But an exception exists, upon the principles of public policy, in respect to the property of a quasi public corporation which is essential to the enjoyment of its franchises for the discharge of those public duties for which it was created. Property acquired and held as essential to the operation of quasi public franchises cannot be seized and sold separate and apart from the franchises, without which the latter would be inoperative. Thus, in Tennessee, without regard to the character of the title, the tollhouses and roadway of a turnpike company are not the subject of execution, levy, and sale. 'The weight of authority is,' said Justice Cooper, speaking for the Supreme Court of Tennessee, 'that the exemption of the franchise from levy will protect all property essentially necessary to its exercise, for the obvious reason that the franchise was conferred for a public purpose, and there ought not to be any disposition of the property except in a mode which would secure a continuance of the use of the franchise for the

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benefit of the public. The rights of creditors are sufficiently secured by the right to attach or impound the tolls, and, if necessary, to sell the property and franchises together.'—*Baxter v. Nashville & N. Turnp. Co.*, 10 Lea [Tenn.] 488, 493. This doctrine has received very general sanction. Elliott, Railroads, §§ 520, 1074; Morawetz, Priv. Corp. § 1125; *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L. Ed. 635; *East Alabama R. Co. v. Doe ex dem. Visscher*, 114 U. S. 340 [5 Sup. Ct. 869] 29 L. Ed. 36; *Ammant v. New Alexandria & P. Turnp. Road Co.*, 13 Serg. & R. [Pa.] 210, 15 Am. Dec. 593; *Louisville N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A 435."

It seems that in Pennsylvania, statutes of sequestration have been provided for the enforcement of liens against the property and franchises of public utility corporations. In the case of *Reynolds v. Reynolds Lumber Co.*, 169 Pa. 626, 32 Atl. 537, 47 Am. St. Rep. 935, this is said upon the subject: "When the operations of a corporation are matters of direct public interest and concern, its property reasonably essential to the exercise of its franchises is stamped with the character of a public trust. It cannot be aliened by the corporation, nor sold by its creditors piecemeal, so as to stop its operations and defeat the object of its charter. Before the act of 1870 such property could not be taken in execution in this state. The sequestration proceedings of the act of 1836 were suggested by Chief Justice Tilghman in the opinion in *Ammant v. New Alexandria, etc Turnpike Co.*, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593, and after the passage of that act it was held in *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315, that the franchises and corporate rights of a canal company and its property necessary to their exercise were incapable of being trans-

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ferred or granted away by any act of the company itself, or by any adverse process against it, and that sequestration was the only remedy consistent with the preservation of the public interests. The act of 1870 provides a remedy without prejudice to the public interest, by the sale together of the franchises and the property necessary to their exercise." In notes to the above case as reported in the American State, and L. R. A., Reports, may be found many other cases to the same effect, the weight of which, we think, settles the law to be that there cannot be a valid sale of a small part of a railroad right of way in the manner, or with the purpose, contemplated in the attempted sale in this case by the appellant city, and that a court of equity has the power to enjoin such a sale, and diversion from the public use to which it is being devoted, of quasi public property. If any further authority should be thought necessary to support our conclusion in this case, we think it can be found in the decisions of the Supreme Court of the United States.

In the case of *Gue v. Tide Water Canal Co.*, 24 How. 357, 16 L. Ed. 635, which was a bill to enjoin an execution sale of canal locks and sundry other property of the canal company, the opinion was written by Chief Justice Taney; and it was therein held that at common law a franchise of a public service corporation could not be sold under execution, and that, as there was no statute of the state of Maryland authorizing such sales, or sequestration, the courts, state and federal, could not lawfully order such sales, and that a court of equity would enjoin any attempt so to do. In that case, among other things, it was said by that great Chief Justice: "The tidewater canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susque-

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hanna river usually passes, in order to reach tidewater and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of the assembly which created the corporation. The property seized by the marshal is of itself of scarcely any value apart from the franchise of taking toll, with which it connected in the hands of the company, and, if sold under this fieri facias without the franchise, would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless. Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute in Maryland changing the common law in this respect." We do not think that any of the cases relied on by appellant hold to the contrary. The decisions of the Supreme Court of the United States, cited by appellant, merely hold: (1) That in certain cases it is a question of fact as to whether given railroad property is benefited by a given public improvement of other highways; and (2) that exemptions in charters of railroads, from certain taxation, do not include local improvements or assessments, such as are sought to be enforced in this case. Such is the holding of *L. & N. R. R. Co. v. Barber*, 197 U. S. 434, 25 Sup. Ct. 466, 49 L. E. 819, as to the first proposition; and such is the holding in *I. C. R. R. Co. v. Decatur*, 147 U.

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S. 202, 13 Sup. Ct. 293; 37 L. Ed. 132, as to the last proposition.

As to the other authorities relied upon by appellant, they hold in line with what is said by Mr. Elliott, above quoted by us, and a part of which is quoted by appellant in its brief. As before stated, it is neither necessary nor proper that we should now, upon this appeal, pass upon the question as to whether or not the right of way of a railroad company can, in a given case, be assessed as abutting property, for local improvements of streets, for the reason that this question was not passed upon by the lower court; but, as counsel for appellant have cited and relied upon the text of Mr. Elliott, which we have quoted above, without committing ourselves to the "rule" as stated by Mr. Elliott, or to that of those holding the contrary view, we merely refer to the case of *Detroit, Grand Haven & Milwaukee Ry. Co. v. Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. Rep. 466, where authorities are cited, wherein it is said: "The first question is settled by the case of *Lake Shore, etc., Ry. Co. v. Grand Rapids*, 102 Mich. 374 [60 N. W. 767, 29 L. R. A. 195], which holds that railroad property cannot be sold for these assessments. The right of way so assessed contains the main track and one side track. It has nothing else upon it, and is used for no other purpose. It has already been dedicated to a public use, and the question is presented whether a railroad right of way can be assessed by municipal corporations for public improvements. So far from being any benefit, it is established by the evidence that the opening and paving of the street were a damage to the complainant. A right of way cannot be benefited by the opening and paving of a street across it. None of the buildings of the complainant are within two blocks of this crossing. We

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can see no benefits, immediate or prospective, to the complainant. The division of the right of way into three parcels was arbitrary, as were also the valuations and supposed benefits. The point is so clearly and concisely stated by the Supreme Court of Pennsylvania that we quote the opinion in *Philadelphia v. Philadelphia, etc., R. R. Co.*, 33 Pa. 43: 'The municipal authorities paved the Gray's Ferry Road for a considerable distance, at a place where it lies side by side with the defendant's railroad, and now seek to charge them with half of the cost of it; but they cannot do it. Their claim has no foundation, either in the letter of the law or in its spirit, nor in the form of the remedy. Not in the letter, because the defendants do not own the land sought to be charged, and have only their right of way over it. Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers in a common benefit; and, as a railroad cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we cannot presume that the compulsion was intended to be applied to them. Not in the form of the remedy, because the execution for this sort of claim is *levari facias*, a writ not commonly allowed against corporations, and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one.' "

It follows that the trial judge was correct in overruling the appellant's demurrer to the bill, which sought to enjoin the sale of a part of appellee's right of way.

Affirmed.

DOWDELL, C. J., and ANDERSON and DE GRAFFENRIED, J.J., concur.

[Moss, et al. v. Nye.]

Moss, et al. v. Nye.***Bill for Partition.***

(Decided May 15, 1913. 62 South. 776.)

1. *Partition; Right to.*—Partition among joint tenants of land is a matter of right, including a sale for distribution; it is incident to all tenancies in common, however created, unless restricted or prohibited by contract or by law.

2. *Same.*—Homesteads vesting in the widow and minor children of the deceased, under the statute of distribution, was subject to the exercise of the rights of partition by any of the tenants in common; this has reference to conditions prior to the adoption of the Code of 1907.

3. *Same.*—The provisions of section 4196, Code 1907, are not retroactive, and hence, does not prevent the partition of a homestead among tenants in common such as described in said section, the title to which vested in them before the statute was enacted.

APPEAL from Shelby County Court.

Heard before Hon. E. S. LYMAN.

Bill by Mary L. Nye against Carrie L. Moss and others for sale of lands for partition. Decree for complainant, and respondents appeal. Affirmed.

The case made by the bill is that complainants and respondents are interested in a certain tract of land, their various interests being set out, and that said land cannot be partitioned or divided equitably without a sale. The respondents filed an answer and cross-bill in which they deny that complainant is interested in or has any title to said land. They allege the facts to be that Carrie L. Moss is the widow of Henry C. Moss, who died July 9, 1904, and that she has never remarried; that the said H. C. Moss had a former wife now deceased, and that Mary L. Nye and others named were the children of H. C. Moss by his former wife, and that the said Mary Nye and George P. Moss were minors at the time of the death of said Moss, and that the other respond-

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ents named are the children of said H. C. Moss and the said Carrie Moss, and that each of them were minors at the time of the death of the said H. C. Moss; that at the time of the death of Moss he owned the land described in the original bill of complaint, and also a three-fifths interest in a store lot in Calera, Ala., and at the time of his death his estate was insolvent; that there was no administration, and that no homestead had been set apart or assigned to respondent and the minor children, and that as such widow and such minor children they had the right to retain the said land until the homestead is set apart; and the other facts necessary to show a want of action in the probate court or otherwise affecting the estate of the said H. C. Moss.

RIDDLE, ELLIS, RIDDLE & PRUET, for appellant. The right to sell a homestead is not a vested right, and it is entirely competent for the Legislature to take away that right as it did do by section 4196, Code 1907.—*Abbott v. Page*, 32 Ala. 571; *C. R. S. Co. v. Barclay*, 30 Ala. 120. The remedy here sought is purely statutory and did not exist irrespective of the statute.—Secs. 5203, 5321, Code 1907; *Delony v. Walker*, 9 Port. 497. There is no question about the homestead having vested absolutely in the widow and minor children.—*Hall v. Hall*, 171 Ala. 618. The law governing at the time of the death of the ancestors will determine the rights of the heirs.—*O'Daniel v. Gaynor*, 150 Ala. 205.

BROWN, LEEPER & KOENIG, for appellee. The title vested absolutely in the widow and minor children without any proceeding to set it apart.—*Hall v. Hall*, 171 Ala. 618; *Faircloth v. Carroll*, 137 Ala. 243. It was such an absolute title as was inheritable by the heirs of the children.—*Sims v. Sims*, 165 Ala. 141. The

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rights in this instance were not affected by the adoption of section 4196, Code 1907, as they were acquired before the adoption of *such* section.—*Werzler v. Kelly & Co.*, 83 Ala. 440. The right of partition is a matter of right.—34 Cyc. 1766.

SOMERVILLE, J.—The sole question of merit presented by this appeal is whether the provision found in section 4196 of the Code of 1907, that when the decedent's estate is insolvent his homestead shall vest in the widow and minor children absolutely, "and shall not be sold or partitioned by order of any court until the death of the widow and the youngest child is of age," etc., is retroactive in its operation, so as to thus restrict the judicial sale or partition of homesteads already vested in the joint ownership of the persons designated, by the death of the husband and father prior to the enactment of the quoted provision.

Partition, including sale for distribution, among the joint owners of land, is a matter of right.—*Donnor v. Quartermans*, 90 Ala. 164, 8 South. 715, 24 Am. St. Rep. 778; *Gore v. Dickinson*, 98 Ala. 363, 11 South. 743, 39 Am. St. Rep. 67. It is unquestionably a valuable right, since it vitally affects the potential use and availability of the cotenant's estate. It is incident to all tenancies in common, however created, unless restricted or prohibited by contract or by law.

Prior to the adoption of the present Code, homesteads vesting under the statute in the widow and minor children were subject to the exercise of this right by any of the tenants in common.—*Faircloth v. Carroll*, 137 Ala. 246, 34 South. 182.

There is nothing in the statute referred to, either expressed or implied, indicative of a legislative purpose to extend the operation of the quoted provision to jointly

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owned homesteads already vested under the former statute. The rule of construction is well settled. "Retrospective statutes, when within legislative competency, are not favored, and it is a sound rule of judicial construction that they shall operate prospectively only, unless the terms show a clear legislative intent that they shall operate retrospectively.—Cooley's Con. Lim. 369; Sedgwick on Stat. and Cons. Law, 161. The statutes excluded from judicial favor, and subjected to this strictness of judicial construction—statutes which may be properly denominated retrospective—are such as take away or impair vested rights, acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past."—*Ex parte Buckley*, 53 Ala. 42, 54.

We think it clear that the provision in question must be construed as not retroactive in its intended operation. 36 Cyc. 1209d, 1210e. We need not inquire nor determine whether it is within the legislative power to have made it so. An able discussion of that question will be found in the case of *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517.

There is no merit in appellant's suggestion that this provision was designed to correct an immoral and unconscionable evil, and that therefore a retroactive operation is favored by the law. The question is one of policy merely, and not of morals, and the policy of preventing any partition during the widow's life, even with her consent, is at least fairly debatable.

The fee-simple title to this homestead being vested in complainant and respondents by force of law without judicial allotment, complainant is entitled to a sale thereof for division; and there is no occasion for the intervention of a court of equity to ascertain and declare

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the insolvency of the decedent's estate in order to vest the absolute title.

The rulings of the chancellor in sustaining the demurrers to the cross-bill are in accordance with the views above expressed, and the decree will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Bill to Quiet Title.

(Decided June 3, 1913. 62 South. 798.)

1. *Equity; Pleading; Cross Bill.*—Cross bills may be divided into two classes; first, those which are merely defensive, including those alleging facts merely to aid in the complete determination of the matter in controversy; and second, those praying for affirmative relief against a complainant, or a co-defendant, or other necessary parties.

2. *Same; Dismissal of Bill; Effect on Cross Bill.*—While the general rule is that the dismissal of a bill carries the cross bill with it, if the cross bill shows ground for equitable relief arising out of the subject matter of the original bill which will sustain the court's jurisdiction independent of the original bill, the dismissal of the original bill will not carry the cross bill with it.

3. *Same; Cross Bill.*—A cross bill has some of the characteristics of a separate suit, and yet it is not a distinct suit, since such cross complainant may be eliminated as a defendant by amending the original bill, and because of the provisions of section 3118, Code 1907, obviating the necessity of issuing summons to a party complainant in the original bill.

4. *Same; Removal of Cloud; Waiver.*—Although it would have been a good ground of demurrer, the failure to demur to a cross bill to remove a cloud upon title because of the allegation that the instrument creating the cloud was void on its face, was a waiver of that objection to the cross bill.

5. *Same; Dismissal; Cross Bill.*—Although the original bill was bad for want of a jurisdictional allegation, its dismissal did not carry the cross bill to cancel an instrument as a cloud upon title where the cross bill was sufficient to sustain the court's jurisdiction.

6. *Quieting Title; Cloud; Void Instrument.*—An instrument void on its face cannot create a cloud upon title.

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APPEAL from Jefferson Circuit Court.**Heard before Hon. John C. PUGH.**

Bill by Stephen Bell against George McLaughlin to quiet title. Cross bill by respondent for like purposes. From a decree in favor of cross complainant, original complainant appeals. Affirmed.

ALLEN & BELL, for appellant. When by law a court is authorized to exercise a special jurisdiction that jurisdiction must be exercised in strict compliance with the statute giving the authority, else the attempted proceedings will be void.—11 Cyc. 728 Note 28; *Mattox v. Gato Cigar Co.*, 39 South. 777; *Garlick v. Dunn*, 42 Ala. 151; *Walker v. State*, 39 South. 242; *Winn v. McCraney*, 46 South. 854. The Circuit Court of Jefferson county has no power to make any orders in a chancery case unless taken within certain days previously designated by the court as being the time at which chancery cases will be heard by the Court. Weakley's Act. Jeff. Co. p. 609. An order of a judge fixing a term of Court must affirmatively appear in the record. 11 Cyc. 727, note 17; *Atkinson v. State*, 25 South. 624; *Ex parte Hooker*, 49 Cal. 465; *Stevens v. Ross*, 1 Cal. 94; *Piggott v. Ransdell*, 2 Ill. 145; *Farr v. State*, 135 Ala. 71. Unless a cross-bill is in its nature defensive and germane to the issues raised by the original bill it will not support a decree. *Continental Co. v. Webb*, 54 Ala. 688; *Gambrill v. Patton*, 70 Ala. 626; *Tutwiler v. Dunlap*, 71 Ala. 126. If an original bill be without equity a cross bill to the same will not support a decree. *Continental Co. v. Webb*, 54 Ala. 688. If an original bill drawn under section 5443 of the Code of 1907 failed to allege that there is "no pending suit," then the bill is without equity. Code Sec. 5443; *Parker v. Boutwell*, 119 Ala. 297; *Bollen v. Allen*, 150 Ala. 201. Where the

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instrument, if ineffective at all, is ineffective on the face of it, then it cannot be removed as a cloud on title. *Patterson v. Simpson*, 147 Ala. 550; *Green v. Boaz*, 157 Ala. 68; *Parker v. Miller*, 157 Ala. 282; *Pixley v. Huggins*, 15 Cal. 127-133; *Rea v. Longstreet*, 54 Ala. 291-294; *Lytle v. Sandefur*, 9 South. 260-261, 93 Ala. 396. Counsel also cite *Martin v. Martin*, 173 Ala. 106; *Goodwater C. Co.*, 137 Ala. 621.

STERLING A. WOOD, and CLEMENT R. WOOD, for appellee. It is not necessary to issue a summons to a complainant in the original bill made a defendant in the cross-bill.—Sec. 3118, Code 1907. The cross-bill contained independent equity for relief.—*Kinney v. Steiner*, 52 South. 593.

McCLELLAN, J.—The original bill, filed October 25, 1909, by Stephen Bell against George McLaughlin, was designed to invoke only the statutory system provided to compel the determination of claims to real estate. Code, §§ 5443-5448.

McLaughlin constituted his answer a cross bill; and therein sought to invoke the general jurisdiction of equity to cancel and remove as cloud upon his title a certain paper, of date February 19, 1869, purporting to be a deed from Peyton King to Stephen Bell. This cross-bill also expressed the purpose to invoke the statutory system for the determination of claims to real estate, and thereby to have cross-complainant's title quieted as against any right, title, or claim of original complainant, Stephen Bell. Neither the original bill nor the cross-bill carried the averment that there was no suit pending to enforce or test the validity of the title, claim, or incumbrance claimed or reputed to be claimed by the respondent or cross-respondent, respect-

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ively, to or upon the plot of land in question. The decree concluded against original complainant and in favor of cross-complainant, pronounced title to the land to be in him, and proceeded to effect the cancellation of the paper of February 19, 1869.

Generally speaking, cross-bills are divisible into two classes: those which are simply defensive of the case made by the original bill, including in this category such pleading when employed to introduce facts in aid only of a complete determination of the matter already in litigation—a pleading possessing no distinct individuality and upon which no distinct relief can be granted; and those which set up additional facts relating to the subject-matter of the original bill—but which are not averred in the original bill—and prays for affirmative relief against the complainant or complainants, or against a codefendant or codefendants, or against any others who, though not parties to the original bill, are necessary parties to the cross-bill. *Sims' Chancery Pr.* p. 421 et seq.; *Wilkinson v. Roper*, 74 Ala., 140, 145, 146; *Story's Eq. Pl. notes* on pp. 373, 386, 387, 9 South. 423; *Continental Ins. Co. v. Webb*, 54 Ala. 688; *Ex parte Jones*, 133 Ala. 212, 214, 32 South. 643; 5 *Ency. Pl. & Pr.* p. 648 et seq.; *Coster v. Georgia Bank*, 24 Ala. 37; *Paulling v. Creagh*, 63 Ala. 398.

The general rule is that upon the dismissal of an original bill a defendant's cross-bill falls with it. But "where the cross-bill shows grounds for equitable relief for matters growing out of the subject-matter of the original bill *which may uphold the jurisdiction of the court independent of the original bill*," the dismissal of the original bill will not carry with it such a cross-bill. *Etowah Mining Co. v. Will Valley Mining Co.*, 121 Ala. 672, 674, 25 South. 720. The italicized lang-

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uage unmistakably concludes to the point that the jurisdiction of the court to which such a cross-bill is exhibited may be invoked and supported by a cross-bill containing the independent equity there prescribed present in the original bill. Such is the doctrine accepted by the Arkansas and Tennessee courts—the former's leading and quite instructive case being *Cockrell v. Warner*, 14 Ark. 345, 354-358. See, also 5 Ency. Pl. & Pr. pp. 657, 658. The chief idea, dominant in the minds of the Arkansas court, was that cross-bills were a part of the judicial process in one cause; being an auxiliary method. Such appears to have been the acceptance, in premise, leading to the expression quoted above from 121 Ala.

While a cross-bill has characteristics of, and is subject to, rules of law and procedure applicable to a separate suit, it is not a distinct action; for, among other reasons, the cross-complainant may be eliminated as a party defendant as the result of amendment of the original bill by the original complainant, and the provision of the statute (Code, § 3118) obviating the necessity, if it were a distinct action, to issue summons to a defendant who *was* a complainant in the original bill.

The cross-respondent did not plead to the cross-bill in any form. Decree pro confesso was entered against him; and the submission for decree included that confession of the facts well pleaded.

It is suggested that the omission to aver in the original bill, with the like omission in the cross-bill, that there was no suit pending to test the claim, etc., of the respective parties was the omission of jurisdictional averment in a tribunal of special limited powers in the premises. See *Martin v. Martin*, 173 Ala. 106, 55 South. 632. We do not find it necessary to decide that question, as it relates to either the original or the cross-bill. Assuming, for the occasion only, that the stated

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contention is generally sound, our conclusion is that the cross-bill, defective as it is in the particular we shall later indicate, was sufficient and effectual to invoke the *general jurisdiction* of equity to cancel and remove a cloud from the averred title of cross-complainant. Having thus obtained this jurisdiction, it was competent for the court, under such decree *pro confesso* suffered by cross-respondent, to pronounce in affirmation of the cross-complainant's prayer that cross-respondent was without title or right to the land; no objection by demurrer or otherwise having been taken to the cross-bill before the rendition of the final decree. *Penny v. B. & A. Mort. Co.*, 132 Ala. 357, 366, et seq., 31 South. 96. The defect in the phase of the bill, whereby the removal of cloud from title was the relief sought, lay in the fact that the bill affirmatively averred the entire invalidity of the alleged cloud because it did not describe any area of land whatsoever—in the averred fact that the alleged cloud was void on its face.

An instrument, void on its face, is incapable of creating a cloud on title. *Rea v. Longstreet*, 54 Ala. 291, 295; *Parker v. Boutwell*, 119 Ala. 297, 302, 24 South. 860. The failure of the cross-respondent to demur to the cross-bill on that account was a waiver of the objection. *Penny v. B. & A. Mort. Co.*, *supra*. So, while on seasonable objection the cross-bill must have been held to be without equity, yet it awakened the general jurisdiction of equity to the end the cross-bill prayed. And in consequence, even if the original bill was wholly unavailing because of the omission of the (assumed for the occasion) jurisdictional averment of *no suit pending*, the independent equity afforded by the cross-bill served to support the jurisdiction of the court in the premises.—Author. *supra*.

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There are two features to the decree. One pronounced void and canceled the instrument of February 19, 1869, as a cloud on cross-complainant's title. The instrument being void upon its face, that pronouncement and the effectuation thereof was a work of supererogation. The other feature of the decree conformed to the confessed well-pleaded facts wherefrom the right and title of cross-complainant to the land was shown by the cross-bill. No prejudicial error appearing, the decree is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Bill to Annul Lease and to Enjoin Waste.

(Decided June 30, 1913. 63 South. 76.)

1. *Public Lands; School Lands; Grant to State.*—The provisions of the act admitting Alabama to the Union granting certain lands for school purposes known as the 16th section lands, was not a donation to the state, but the fulfillment of an agreement between the state of Georgia and the Federal government by which the lands were ceded to the Federal government, and which agreement provided that the provision of the ordinance governing the Northwest Territory should apply to such lands.

2. *Same; Effect of Grant to State.*—As the inhabitants of the township were not incorporated, the title to the 16th section land could not vest in them, but vested in the state for their use and benefit, which trust the state accepted.

3. *Same.*—After the acceptance of the trust by the state Congress had no further right to interfere in the control of the 16th section land, and its act authorizing the sale thereof conferred no additional power upon the legislature with respect thereto.

4. *Same; Lease by State.*—Since the statute of limitations applies to actions to recover the 16th section lands, and since they can be sold with the consent of the inhabitants, there can be no question that they can be leased in accordance with the provision of the statute.

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5. *Same.*—The local and general laws of Alabama with regard to the 16th section land have committed to the agents or officers appointed or elected as provided by law, entire management and control of those lands, and such boards or officers may lease them for the purpose of turpentine the trees and removing the timber therefrom.

5. *Same; Pleading; Construction Against Pleader.*—Where the bill to cancel leases does not affirmatively show that the consent of the inhabitants to a lease of 16th section lands was not given, such consent will be presumed, if it be conceded that the acts of Congress and the state statutes require such consent.

6. *Evidence; Judicial Knowledge.*—The courts cannot judicially know whether or not the consent of the inhabitants of a certain township to the sale or lease of school lands had been ascertained or given since the admission of the state, under any of the various statutes governing such lease or sales.

7. *Statutes; Construction; Contemporaneous Construction.*—Where the proper construction is in doubt the contemporaneous construction placed thereon by the court, and by officers whose duty it was to construe it, should be regarded in determining the proper construction.

APPEAL from Mobile Chancery Court.

Heard before Hon. R. T. ERVIN, Special Chancellor.

Bill by the State of Alabama against the Board of School Commissioners of Mobile County to annul certain leases, to enjoin waste and for other purposes. Decree for respondent on demurrer, and complainant appeals. Affirmed.

The following is the decree of the chancellor:

“The bill joins as respondents the school board, the individual members thereof, and those who have been members of this board for some time past, with various other parties to whom it is alleged leases have been given by such board authorizing such parties to box for turpentine and to cut the timbers from the sixteenth section and the lands given in lieu of such section. It alleges that the leases are void and give no rights to the lessees to box or cut the timber, as the school board was without authority to execute such leases. It prays that the school board may be enjoined from executing any additional such leases, and that those which have been

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executed may be canceled and surrendered, and that the members of the board who were such when these leases were executed and the parties who held such leases may be required to account for the damage done by boxing or cutting or removing the timber. It will be observed that the bill makes no charge that any commissioner acted in bad faith or profited in any way from or by these leases, nor is it alleged that the commissioners knew when such leases were made that they had no right to make them. The demurrers raise a number of questions, many going to the technical sufficiency of the bill, while others go to the merits, and without undertaking to point out specifically I am of the opinion that many of them are good. There are no facts alleged showing that the board has under contemplation the making of any other such leases; certainly the court cannot assume that the board will make such leases, when it is informed that its power to so lease is questioned. I do not, therefore, consider the bill good as seeking to enjoin the making of other leases. Under the allegations of the bill it would appear that, even if the school board had no right to make the leases in question, they were made by such board under the bona fide belief that they had such right. In passing upon the leases when acting in good faith, the members of the board were acting judicially, and I do not consider them personally responsible in damages for such an honest mistake in judgment, and I therefore consider that under the allegations of this bill the members of the board, both past and present, are not liable. There being no allegation of anything received by the individual members of the board, there is no equity in the bill for an accounting against them. There can be no equity for an accounting against the board where there is no allegation of misappropriation of funds received by it;

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besides, this board is only a state agency to handle and disburse the school funds. As a bill to restrain impending work, there are no allegations either as to the board or its members, past or present, which give it equity as such. I fail to find any allegation giving it equity against the board, past or present, as a bill to administer a trust, and I therefore consider the bill to be multifarious in so far as it joins the board of commissioners or its members, past or present.

“This brings us down to the question of whether there is any equity under the allegations of this bill to cancel the lease as a cloud on the state’s title. It will, of course be conceded that if the leases were authorized then the bill is wanting in equity. All controversies involving the legal title to lands belong properly to the jurisdiction of courts of law, and are more properly tried by a jury. Hence it is only when it is necessary to prevent fraud or irreparable injury that a court of equity will intervene to prevent a sale of land under judicial process, issuing from the courts of law. No special equity existing, the parties must be remitted to a court of law for the determination of questions of law. *Caldwell v. Lawler*, 70 Ala. 295; *High on Injunction*, 267. A bill cannot be filed to remove a cloud on the title when the alleged cloud is a deed void on its face, or based on a judicial sale under a void judgment or decree. *Calwell v. Lawler, supra*; *Smith v. Gilmer*, 93 Ala. 226, 9 South. 588. The test of whether a cloud exists is, Would the party be required to offer evidence in support of his title? *Torrent F. Co. v. City of Mobile*, 101 Ala. 563, 14 South. 557. The bill alleges that the leases are void. Assuming this to be true, if the state sue one of the lessees for the alleged trespass, would it be required to offer any evidence to show such lease to be void? I think not. If such lease is void for want of

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authority in the school board as alleged, then, when the lessee sought to show his authority for his acts, the court will hold same to be void for want of authority in the board, and no evidence will be required on the part of the state in question. The affirmative would be on the lessee to show a lease from some one authorized to execute it, and this he could not do, so I find no equity in the bill to remove the cloud.

"This leaves only one question, Can the bill be maintained to require all the alleged lessees to respond in a court of equity for alleged trespasses made by them on the school lands? Under the facts alleged in the bill, and under the authorities in this case, I do not consider that in the multiplicity of suits there is a sufficient independent equity to be invoked by the state to authorize this bill. *Jones v. Hardy*, 127 Ala. 221, 28 South. 564; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 132; *Roanoke Guano Co. v. Saunders*, 173 Ala. 347, 56 South. 198, 35 L. R. A. (N. S.) 491; *So. Steel Co. v. Hopkins*, 174 Ala. 465, 57 South. 11, 40 L. R. A. (N. S.) 464."

R. C. BRICKELL, Attorney General, R. B. EVINS, and LEIGH & CHAMBERLAIN, for appellant. The legal title to the lands on which the trespasses are alleged to have been committed is in the state, and the state has a right to bring this action.—*Long v. Brown*, 4 Ala. 629; 49 Ark. 172; 36 Cyc. 907; 49 South. 611; 58 South. 1033. There is nothing in the proposition that the bill is multifarious.—*M. & P. Line v. Wagner*, 71 Ala. 571; *Long v. K. C. M. & B.*, 54 South. 62. The fact that the suit is against the board does not make it a suit against the state.—29 Cyc. 1441. The constitutional inhibition against the state being made a party defendant is for the benefit of the state, and can be waived by the state.

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—*Comer v. Bankhead*, 70 Ala. 493; *Ex parte McDonald*, 76 Ala. 603; 36 Cyc. 915. The bill has equity as a bill for the cancellation of leases made by the Board of School Commissioners.—*Borst v. Simpson*, 90 Ala. 373; *Smith v. Pearson*, 24 Ala. 355; *Eufaula N. Bank v. Pruitt*, 128 Ala. 470. If the conveyances are void on their face, equity would still have jurisdiction because of the irreparable injury alleged.—*Caldwell v. Lawler*, 70 Ala. 293; *Lyon v. Hunt*, 11 Ala. 309; *Ninninger v. Norwood*, 72 Ala. 277; 26 S. W. 271. These same authorities establish the equities of the bill as a bill for injunction.—*Wilson v. Myer*, 144 Ala. 405; *Burden v. Stein*, 27 Ala. 104. The bill is maintainable as a bill for an accounting.—1 Cyc. 424, 426-7-8; *Avery v. Ware*, 57 Ala. 475. The bill has equity because filed in the administration and enforcement of a trust.—*Long v. Brown, supra*; 39 Cyc. 588-591; 89 N. E. 973; *V. & A. M. Co. v. Hale*, 93 Ala. 542. The bill presents a case of equitable cognizance as preventing a multiplicity of suits.—1 Ark. 282; 32 Am. Dec. 689; 6 Johns. Ch. 139; *Morgan v. Morgan*, 3 Stewart 383; *Bolman v. Lohman*, 74 Ala. 510; *Kennedy v. Kennedy*, 2 Ala. 609; *Fleming v. Gilmer*, 36 Ala. 67; 70 Miss. 182; *Peters v. Rhodes*, 157 Ala. 25. Courts of equity will enforce statutory penalties along with the claim for damages.—*Chandler v. Crawford*, 7 Ala. 510; *Cobia v. Ellis*, 149 Ala. 108; *Gulf C. Co. v. Jones*, 157 Ala. 32; *State v. McBride*, 76 Ala. 51; 108 U. S. 436; 16 Cyc. 77.

“The general rule is, that when equitable jurisdiction attaches for a rightful purpose, the Court will retain it, and proceed to settle and adjudicate all matters in controversy, granting complete relief, though it may involve the adjudication of purely legal questions.”—*Boyd v. Hunter*, 44 Ala. 705; *Stow v. Bozeman*, 29 Ala. 397; *Chose v. Brighton*, 93 Mich. 285; *Pioneer Sav.*

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& *L. Co. v. Garrett*, 20 Tex. Civ. Ap. 111; *Con. Ins. Co. v. Garrett*, 125 Fed. 589; *Clark v. White*, 37 U. S. (12 Pet.) 178; *U. C. Life Ins. Co. v. Phillips*, 102 Fed. 19; *Griffin v. Griffin*, 163 Ills. 216; *U. S. v. Gaylord*, 79 Fed. 21; *Pack v. Tie Co.*, 116 Fed. 273; *Brown v. White*, 39 Fla. 102; *Watson v. Watson*, 45 W. Va. 290.

GREGORY L. & H. T. SMITH, and HANAW & PILLANS, for appellee. The state can never be made a party defendant.—*Comer v. Bankhead*, 70 Ala. 495; Sec. 14, Constitution 1901, 1 Peters 110; *Ala. G. I. S. v. Reynolds*, 143 Ala. 579; *Holmes v. State*, 100 Ala. 291; 12 Am. Dec. 153; *White v. Ala. I. Hospital*, 138 Ala. 479. The authorities cited by appellant do not bear out the assertion that the state may be sued by consent.—Authorities supra. The board was fully authorized to do the things complained of.—Acts 1853-4, p. 190; Acts 1855-6, p. 148. If the act of the Board was unauthorized then the action should be against those who entered and cut the trees and not against the Board. The bill was not good as a bill for discovery.—*Shackelford v. Bankhead*, 72 Ala. 476; *Continental L. I. Co. v. Webb*, 54 Ala. 689; *Guice v. Parker*, 48 Ala. 616. The foundation of appellant's case rests upon the assumption that the restriction upon the state's power of sale rests upon the consent of the inhabitants of the township and deprives the state, however acting, of all power to lease, etc. If the state had no power of disposition the statute of limitations could not run, and the opinion in the case of *State v. Sadie Schmidt*, is all wrong.—*State v. Schmidt*, in MSS. No title ever vests in the lessee under the lease, but only the privilege of removing the turpentine and timber within a given time.—*Zimmerman M. Co. v. Daffin*, 143 Ala. 383. Hence, the lease was not a sale of any interest in the

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land.—*Millikin & Co. v. Carmichael*, 139 Ala. 228; 105 Fed. 941; 196 Fed. 767. The authority to lease is conferred by section 1803, Code 1907, which is vested in the Superintendent of Education. By the act approved Dec. 13, 1836, The Commissioners of Mobile, were empowered to do the particular thing here complained of. Counsel cite other statutes bearing on this subject, but it is not deemed necessary to here set them out.

MAYFIELD, J.—This is a bill in equity by the state against the board of school commissioners of Mobile county, as a corporation, against each present and each ex-member, individually, and against scores of persons to whom the present board and past boards have made leases of the sixteenth section school lands of Mobile county for the purpose of turpentine and removing timber therefrom. The theory of the bill is that these leases are void because unauthorized by law, and that the lessees, acting under the leases, have committed, are committing, and will continue to commit waste as to these school lands by denuding them of their valuable pine timber and taking the turpentine therefrom. The bill seeks to cancel the lease contracts and to enjoin the alleged waste, and seeks a decree against members of the board and the lessees for damages suffered on account of such waste already committed. The respondents, as a board, and various individuals, as defendants, demurred to the bill for want of equity and for various other grounds, such as multifariousness, as for misjoinder of parties and of suits, and for failure to allege facts sufficient to authorize the bill as one for an accounting or one to prevent a multiplicity of actions at law. The special chancellor sustained the demurrer as for want of equity and on several special grounds mentioned above, as shown by his opinion on file, which the

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reporter will set out, and which will elucidate the issues raised, and make certain the questions decided by him and by us on this appeal.

The fundamental question for decision on this appeal is whether the leases in question are valid or void. If valid, and the board is authorized to make other similar leases, then it is conceded that there is and can be no equity in the bill, and there is no necessity to pass upon other questions raised and insisted upon. If, however, the leases are unauthorized and void, then it will be necessary to pass upon the other questions.

No one of the many leases is set out in full or in part, and no particular irregularity or insufficiency is set out or relied upon; no bad faith is alleged on the part of the board as a unit, or on the part of any individual member in general, nor as to any particular lease. The allegation and insistence is that the board had no authority of law to make the leases, that their acts in the matter were on account of mistake of the power and authority conferred by the Legislature.

The position of the state's counsel is that the lands in question were granted by act of Congress to the state in trust for the use and benefit of the inhabitants of the respective townships, and that, by the condition of that trust, the trustees could not sell the lands except by the consent of the majority of the inhabitants of the respective townships, and that the trustee, the state, had not authorized, and could not by an act authorize, a sale in violation of the trust imposed by the act of Congress granting the lands, and that the leases in question were, in law and in fact, sales of such lands, or of estates or interests in them, without the consent of the inhabitants and in violation of the trust imposed upon the lands.

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These or similar grants by Congress of sixteenth section and indemnity in lieu of sixteenth section lands have been before the state and federal courts for construction, and they have not always received a uniform construction as to the nature and the conditions of the grants and of the trusts imposed, in so far as the relation of the respective states to the inhabitants of the respective townships were concerned.

In the early case of *Long & Long v. Brown et al.*, 4 Ala. 622, wherein the history of these grants in this state is given, it was said by this court (and it is now applicable to the instant case) that: "In relation to the sixteenth section, which constitutes a considerable portion of the land purchased, it is supposed that the vendor never can make a good title, because, first, there was no power to sell the land existing either in the Legislature or in the township, and that the sale was therefore a nullity, and, secondly, if such power existed it was improperly exercised, as the act of the Legislature did not require the assent of all the *inhabitants* of the township.' From the vast number of sales which have been made under the sanction of this law, this question is invested with great interest, and has received our deliberate consideration.

The propriety of reserving a portion of the public land out of the extensive domain from which new states were in future to be created, as the means of providing a perpetual fund for the purpose of education, early received the attention of our wisest statesmen. The first time they were called to legislate upon the lands ceded by the states was in the establishment of the "Ordinance for the Government of the Territory of the United States Northwest of the River Ohio in 1787." They declared by the third article of that celebrated instrument that "religion, morality, and knowledge being

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necessary to good government and the happiness of mankind, *schools and the means of education shall be forever encouraged.*" At the same time, whilst authorizing the treasury to contract for the sale of the western lands, they required the lot No. 16 in each township to be given in perpetuity for the purpose contained in the ordinance. Vol. 1, Land Laws, 361, 362.

By the fifth clause of the first article of "the Articles of Agreement and Cession between the United States and Georgia" in 1802, by which the United States acquired the right to the territory now composing the states of Alabama and Mississippi, it was declared that the territory thus ceded should, when sufficiently populous, form a state, and be admitted into the Union "with the same privileges and in the same manner as is provided in the ordinance of Congress of 13th July, 1787, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids slavery."

The act of Congress of March 2, 1819 (chapter 47, 3 Stat. 491, §6), for the admission of Alabama into the Union declares: "That the section numbered 16 in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." This grant by Congress cannot properly be called a donation; it was the performance merely of a solemn obligation created by the compact with Georgia, and was intended as a grant to the state to be held in perpetuity for the use and benefit of the inhabitants of the township.

The legal title to these lands, could not vest in the inhabitants of the township, as they had no corporate existence, nor could such a capacity be conferred on them

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by the act of Congress, and it is very certain was not intended to be conferred. Nor can any doubt be entertained that the legal title was intended to be vested by the act of Congress in this state, and did so vest, by the acceptance of the conditions proposed by the act of March 2, 1819, by the convention of this state in August of the same year. By the acceptance of this trust the state necessarily stipulated to do those acts which were necessary to give full effect to the grant, and this trust it has faithfully executed. As early as 1819 agents were appointed to take care of the lands, and subsequently school commissioners were appointed, and trustees required to be elected by the township for the management of the sixteenth section in each township, who were declared a body corporate.

As the land in its wild state was of no benefit to the people of the township, and as a revenue could only be derived from it by cultivation, the lands were leased under suitable provisions to preserve them from waste. It was soon, however, discovered that this process would end in the destruction of the land; everywhere the sixteenth section was in a state of ruinous dilapidation. In this condition of things, application was made to Congress by the Legislature of this state for leave to authorize the sale of the sixteenth section by the assent of the township, which was granted—the proceeds of the sale to be invested in some productive fund.

We agree entirely with the counsel for the plaintiff in error, that this act conferred no power; nor had Congress any right whatever to interfere in the matter. It is, however, evidence of the strong desire of the Legislature to act in good faith, and to keep within the pale of the law. Having thus obtained the assent of Congress, the Legislature passed an act authorizing the

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sale of the sixteenth section in each township with the *assent of the inhabitants*, the proceeds to be placed in one of the banks of the state, and to carry interest at the rate of 6 per cent. per annum, payable quarterly, and secured to the people of the township whose lands were thus sold.

It is very clear that power must exist somewhere to control the subject of the grant, so as to make it subserve the purpose it was designed for. The state very properly supposed that this power was lodged with the inhabitants of the respective townships; a majority therefore were authorized to act, and, if in their opinion a sale of the land was advisable, to make sale thereof. The whole scope and design of the law is merely to give the assent of the state to such sale, and by providing the necessary machinery to carry out in action the wishes of the township, and at the same time afford the inhabitants a guaranty that the principal of the proceeds of such sale should be forever kept inviolate for the benefit of posterity, and the annual interest only be consumed by the existing generation. The act authorizing these sales, passed in 1828 (Laws 1827, 1828, p. 31) requires the assent of the inhabitants of the township to such sale to be ascertained by taking the vote of the qualified electors resident in the township, a majority of whom voting in the affirmative was necessary to a sale.

This doctrine was quoted and re-affirmed in *Hardy v. Br. Bank at Montgomery*, 15 Ala. 722, in which a certain part of an act authorizing the cancellation of sales of sixteenth section lands was held void for reasons stated in the opinion. These two cases were again referred to, in the case of *State v. Mills*, 52 Ala. 487, where it was said: "The state is a trustee of the sixteenth section granted by Congress for the use of

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schools. But the state is a mere trustee, holding only the legal title in trust for the inhabitants of the several townships in which the lands are situate. The inhabitants of the township, not the state, are the cestuis que trust. *Long v. Brown*, 4 Ala. 622. Hence it was held, in *Hardy v. Br. Bank at Montgomery*, 15 Ala. 722, that the Legislature could not by mere enactment rescind or annul a contract for the sale of the sixteenth section, without the assent of the inhabitants of the township, or a majority of them."

In the case of *Miller v. State*, 38 Ala. 600, the question first arose as to whether or not these lands could be acquired by adverse possession. Therein the authorities were reviewed, and the grants and the statutes were construed, and it was decided that title to such lands could be acquired by adverse possession, and that the statute of limitations of 10 years was availing as a defense to an action, brought in the name of the state, to recover such lands. In that case it was said: "By the act of Congress of 2d March, 1819, for the admission of Alabama into the Union, the sixteenth section in every township was granted 'to the inhabitants of such township, for the use of schools.' This court has held that the legal title to these lands could not vest in the inhabitants of the township, as they had no corporate existence; nor could such a capacity be conferred on them by the act of Congress. And the construction placed upon this act has been that the grant is in perpetuity to the inhabitants of the respective townships, and that the legal title to the land is in the state, in trust for the inhabitants of the respective townships in which the lands is situated. *Long v. Brown*, 4 Ala. 629, 631; Code 1852, § 501. This trust the state has executed. As early as 1819 agents were appointed to take care of the lands, and subsequently school commission-

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ers were appointed and trustees required to be elected by the township for the management of the land and the schools in each township, and the officers thus provided for were respectively declared bodies corporate. By the Code the inhabitants of the respective townships are incorporated, and the election of school trustees provided for, who are intrusted with the management of the sixteenth section, and are expressly authorized to direct suits at law or in equity, in all cases affecting the interest of such township. Code, §546. It is not to be doubted that, by virtue of the general authority conferred upon them by the law, as it stood before the Code, the commissioners were clothed with the power to direct suits to recover the possession of the sixteenth section, when it was improperly held by a third person. Clay's Digest, 520, §§7, 8; Id. 521, § 9; Id. 522, secs. 12, 13."

Though the state is a party to this suit, it has no real interest in the litigation. If there be a right of recovery, the property sued for belongs not to the state but to the township, so that, in point of fact, the suit is substantially between the township and the defendant. The Code expressly provides that, in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record. Code, §§ 2130, 2383. In our opinion, the rule that the statute of limitations does not run against the state has no application to a case like the present, where the state, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person, who alone will enjoy the benefits of a recovery. *Miller v. State, Use, etc.*, 38 Ala. 602, 603, 604.

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This decision has been followed in the cases of *Wyatt v. Tisdale*, 97 Ala. 594, 12 South. 233; *Cox v. University*, 161 Ala. 639, 49 South. 814; *State v. Schmidt*, 180 Ala. 374, 61 South. 293. The opinions in the two cases last mentioned discussed and reviewed the authorities at some length on this question, and held that the statute of limitations of 20 years applied to sixteenth section lands; the statute having been expressly changed as to such lands since the decision in *Miller's Case*, 38 Ala. 600. If the statute of limitations applies to actions by the state to recover these lands, and if they can be acquired by adverse possession, and can be sold and title passed, in accordance with the statutes made and provided for this purpose, then surely they can be leased if the leases are made in accordance with the statutes.

It is true that the acts of Congress above referred to and some of our statutes require that the sale or lease shall be made by and with the consent of the inhabitants of the township. The act, however, does not require that the sale or lease shall be made by the inhabitants individually or as a corporation, nor how their consent shall be ascertained or evidenced so as to authorize the sale; nor does it appear that the leases in question were made without the consent of the inhabitants. It does appear, however, that the leases were made by the state, the trustees, acting by and through the boards—bodies constituted by the state as its agents and officers in the premises. It is insisted, however, that this authority to the agent is void because in violation of the trusts imposed by the grants. It was certainly contemplated by Congress, in making the grants, that the lands should be both sold and leased, and that the sales and leases should be by the state for

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the use of the inhabitants, and it appears that the leases in question were so made, and made for such purpose.

The state, of course, can make these sales and leases, only by and through its agents and officers, and it certainly can constitute, appoint, and authorize its agents by acts of the Legislature (which it has done in this case). The only thing not affirmatively shown in this case is that the leases in question were made without the consent of the inhabitants acting either individually or as a corporation, and, construing the bill most strongly against the pleader, we must presume that the leases were made with the consent of the inhabitants, if their consent be required.

To hold that these lands cannot be sold or leased would be, in effect, to defeat the object of the grant. The lands would be of little use to the "inhabitants of the township for the use of the schools" if they could not be sold or leased. And as the acts of Congress and the statutes both provide that the leases and sales shall be made by the state for the use of the inhabitants of the respective townships, the sales and leases can, of course, be made only by the state, and by and through some of its constituted and authorized agencies and officers. This, we think, is conceded by the appellant. Counsel for the state insist, however, that the sale or lease must be in pursuance of the original act of the Legislature, and with the consent of the inhabitants, and not in accordance with the local act of February 15, 1876 (Acts 1875, 1876, p. 363), for Mobile county.

It is to be observed that the acts of Congress do not require the sales to be made by the township or the inhabitants, but by the Legislature, by and with the consent of the inhabitants. The consent of the inhabitants was not required by Congress or by the Legislature as to leases of the lands. The original and subsequent acts

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of the Legislature as to the sales of these lands provided different modes for obtaining the consent of the inhabitants to the sales. These statutes have been repeatedly changed by local and general statutes, and, while the various acts have usually provided some mode for ascertaining the consent of the inhabitants, they have never held that the sales were void for failure to comply with the statutes. These statutes at times have provided for ascertaining this consent at general and special elections held for that purpose. It would therefore be difficult, at this date, to ascertain whether or not the consent of the inhabitants to a sale of the lands had ever been ascertained. Their consent was not usually required as to any one particular sale, but as to any sale at any time. Any number of elections may or may not have been held under these various statutes. This court could not judicially know whether the consent of the inhabitants of a given township had ever been ascertained during the last 75 years. If the Legislature could authorize the sale of these lands 75 years ago, they could do so now. If they could provide a mode for ascertaining the consent of the inhabitants 75 years ago, they can now. If they could so provide by a general law, they could by special ones. A great number of general and special laws as to the sales and leases of these lands have been passed at many sessions, if not at every session, of the Legislature during the last 75 years. The act of Congress never provided that the consent of the inhabitants to a sale should be obtained more than once. The statutes have never provided that such consent should be obtained as to leases. The various statutes have often contained different provisions as to the leases. At times the statutes have provided that certain of these lands should be surveyed and plotted, and timber lots set apart and leased for

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the purpose of planting and cultivating timber. As to other lands, the statutes have provided that no timber should be cut therefrom nor other waste committed, and that "the lessees must in no case cut down, injure, or destroy such timber without the permission from the trustees, which may be given on such terms as they think proper, having a due regard to the interest of their township."

An examination of the statutes, general and local, since the beginning of the government shows conclusively, we think, that the entire management and control of these lands, so far as the sales and leases of the same are concerned, has been by the Legislature committed to its agents and officers appointed or elected as provided. If the land is to be leased for agricultural purposes, it must be cleared of its timber, and, if it must be cleared of its timber, it would be strange if the school trustees, commissioners, or boards could authorize the clearing of the lands for agricultural purposes, yet could not sell, or authorize the sale of, the timber, or, if the lands were covered with long leaf pine timber and suitable for turpentine purposes, could not lease or authorize their lease for such purposes.

It is a matter of common knowledge that some of the best farming lands in the state were covered originally with heavy, virgin forest, and where the timber was long leaf pine the trees were first turpented, then felled, and sawed into lumber. It would be strange logic and law that would authorize the destruction of this timber by felling it and burning it; but that would not authorize the sale or other use of it. On the other hand, if the land is valuable chiefly for the turpentine it will produce, why should it not be leased for this purpose? If extracting the turpentine from the trees renders their preservation difficult and uncertain, and

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the timber is the chief value, why should not the land be leased for the purpose of taking this timber therefrom?

We are unable to see the reason why such use of the land and of the timber was not contemplated by the act of Congress and by the statutes of the state. If the land contained coal, as much of it did, would it be said that the law never contemplated leasing the land for the purpose of taking the coal therefrom?

Lands should be devoted to the use for which nature and commerce have made them most valuable. We are not informed as to the particular nature or character of the scores of different tracts of land involved in this suit; but, if one falls under any one of the classes we have mentioned above, we see nothing wrong or unwarranted in the leases or uses complained of in this bill. The bill shows, and we judicially know, that sixteenth section lands and others like them have for a long time been devoted to the use to which the lands in question are being devoted. As a matter of history, this is true in other states, as to which there were similar grants of similar lands for similar purposes. The books of many states are full of statutes and decisions of the courts as to the sales and leases of these sixteenth section and indemnity lands, and in no instance have we been able to find a statute or decision which would condemn a use of the lands described in this bill, if the lands were by the laws of nature and commerce suited for such use. It is true that statutes may be found in this and other states, prohibiting the destruction of the timber on certain of these lands which had been set apart for particular purposes; but the classification of the lands, and the uses to which each class should be devoted, are matters usually vested by law in the discretion and judgment of the school boards, trustees or superintendents,

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etc. If these agencies and officers act in good faith in the matter, the courts usually decline to revise their discretion. In this case there is no charge of bad faith, but only of lack of authority.

If we were in doubt about the proper construction to be placed upon our statutes and the acts of Congress as to these sixteenth section lands, the contemporaneous construction, placed upon these various statutes by the courts and by the officers whose duty it was to construe them, should be looked to in reaching our conclusion in this case.

The Supreme Court of the United States has spoken as follows upon the subject: "It is an acknowledged principle of law that, if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction, and, if, notwithstanding Treasury Regulation No. 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. As early as 1803 it was held by this court, in *Stuart v. Laird*, 1 Cranch, 299, 309, 2 L. Ed. 115, that a practical construction of the Constitution that the justices of the Supreme Court had a right to sit as circuit judges, although not appointed as such, was not open to objection. 'It is sufficient to observe,' says the court, 'that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or

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controlled. Of course, the question is at rest, and ought not now to be disturbed.' In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.—*McKeen v. De Lancy's Lessee*, 5 Cranch, 22, 3 L. Ed. 25; *Edwards' Lessee v. Darby*, 12 Wheat. 206, 6 L. Ed. 603; *United States v. Alexander*, 12 Wall. 177, 20 L. Ed. 381; *Peabody v. Stark*, 16 Wall. 240, 21 L. Ed. 311; *Hahn v. United States*, 107 U. S. 402, 2 Sup. Ct. 494, 27 L. Ed. 527; *Rogers v. Goodwin*, 2 Mass. 475; Endlich on Stats. § 357." *Schell's Ex'rs v. Fauche*, 138 U. S. 562, 572, 11 Sup. Ct. 375, 34 L. Ed. 1040.

There cannot at this late date be any question that the title to these sixteenth section lands passed out of the United States by the Congressional grants, and that the title thereto passed thereby into the state or the inhabitants of the township, one or both. This being true, the lands passed into the control of the state, subject to the conditions of the grant, and to the rights of the inhabitants of the respective townships for whose benefit the grant was made. It is very true that there is a difference in the decisions of the courts, which has been heretofore pointed out by this court, as to whether these grants vested the legal title in the state or in the inhabitants of the respective townships; but all agree that all title did pass out of the United States by virtue of these grants.

In the case of *Vincennes University v. Indiana*, 14 How. 268, 273, 274, 14 L. Ed. 416, it is said: "The reservations for the seminaries of learning and for schools are made in the same terms, and in some respects must rest on the same principles. In all the western states, north of the Ohio, similar reserves for schools and semi-

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naries of learning have been made. In the case of *Wilcox v. Jackson* (13 Pet. 498 [10 L. Ed. 264]), this court held that a reservation set apart the thing reserved for some particular use, and that, 'whenever a tract of land shall once have been legally appropriated to any purpose, it becomes separated from the public lands.' In the states where school lands have been reserved, the Legislatures have enacted laws to carry out and effectuate the benign policy of the general government. Special authority has been given to individuals elected in the respective townships to lease the lands, sue for rents, etc., exercising, to some extent, corporate powers. The citizens within the township are the beneficiaries of the charity. The title to these lands has never been considered as vested in the state, and it has no inherent power to sell them, or appropriate them to any other purpose than for the benefit of schools. For the exercise of the charity under the laws, the title is in the township. No patent has been issued by the federal government in such cases, as it has not been considered necessary. For the sale of school lands the consent of Congress has been obtained, as that changes the character of the fund." "Land, at common law, may be granted to pious uses before there is a grantee in existence competent to take it, and in the meantime the fee will be in abeyance. *Town of Pawlett v. Clark et al.*, 9 Cranch. 292 [3 L. Ed. 735]; *Witman v. Lex*, 17 Serg. & R. (Pa.) 88 [17 Am. Dec. 644]. 'When a corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it. There is no difference between the case of a grant of land or a franchise to an existing corporation and a grant to a corporation brought into life for the very

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purpose of receiving the grant. As soon as it is in esse, and the franchise and property become vested and executed in it, it is as much an executed contract as if its prior existence had been established for a century.' *Dartmouth College v. Woodward*, 4 Wheat. 518 [4 L. Ed. 629]."

In the case of *Wilcox v. Jackson*, 13 Pet. 498, 517, 10 L. Ed. 264, this is made certain. It is said: "We hold the true principle to be this, that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

We have treated this case as the lower court and counsel have treated it—as if the lands in question were a part of those grants by Congress above referred to by our courts and by the Supreme Court of the United States. We have also treated the case as if the provision of our Constitution (section 270) excepting Mobile county from the operation of that particular article of the Constitution, or any act of the Legislature passed in pursuance thereof, had no effect upon the case. If, however, there should have been error in this respect, the result of this suit must be the same, as the bill evidently proceeded upon the theories, and the state of facts, and the laws, which we have considered.

It follows from what we have said that there is no equity in the bill, and that the special chancellor was correct in sustaining the demurrer to the bill. It also follows that it is unnecessary for us to consider or treat

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the other grounds of demurrer or the questions raised and discussed by the various attorneys in their briefs and argument. If we are right in the conclusion which we have reached, the decision necessarily disposes of the case whatever might be decided as to the other questions.

Affirmed.

DOWDELL, C. J. and McCLELLAN and SAYRE, JJ., concur.

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Bill to Declare a Conveyance Void, and to Enforce Judgment Lien.

(Decided June 5, 1913. 62 South. 782.)

1. *Equity; Bill; Multifariousness.*—A bill by judgment creditor seeking as the sole relief the annulment of a conveyance by a judgment debtor upon the sole ground that it was made to hinder, delay or defraud creditors, was not multifarious, although it contained alternative allegations as to the consideration of the conveyance, as these allegations were mere specifications of the evidence in support of the charge of fraud, and did not destroy the singleness of the bill.

2. *Fraudulent Conveyance; Bill; Knowledge of Grantee.*—In a suit to set aside a fraudulent conveyance, a bill alleging that the grantee shared in or had notice of the grantor's fraudulent purpose, or had knowledge of facts sufficient to inform her of such purpose if diligently followed up by her, sufficiently charges wrongful conduct on her part to avoid the conveyance.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by the B. F. Roden Grocery Company against J. F. Leonard and others, to annul the conveyance as a fraud upon creditors, to declare a judgment lien in favor of complainant, and for a sale of the land for the satisfaction of the judgment. From a decree overrul-

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ing demurrers to the bill, respondents appeal. Affirmed.

The bill shows that the B. F. Roden Grocery Company was, on November 5, 1910, a creditor of J. F. Leonard in the amount of \$943.89, and that on November 26, 1910, said Leonard conveyed a large quantity of real estate then owned by him to one Cora C. Ulen. Thereafter plaintiff recovered a judgment on said debt against said Leonard in the Jefferson circuit court, and had the same duly recorded on March 30, 1912. Execution was issued, and on June 29, 1912, the writ was returned to the sheriff indorsed, "No property found." Section 4 of the bill is as follows: "Complainant avers and charges that the respondent Cora C. Ulen is a sister of the said Leonard, or is a very near and close blood relative, and that the said Leonard was then and is now an unmarried man, and complainant avers and charges that the consideration expressed and recited in the said deed from Leonard to Ulen, mentioned and described in section 3 of the bill, is fictitious and simulated, or that said deed was wholly and entirely voluntary, and without any consideration whatever, or that the said consideration so recited and expressed in said deed was grossly less than the real value of the property conveyed, and that the recited cash consideration of \$2,000, over and above the assumed mortgage indebtedness of the said Leonard on said property, was fixed and agreed upon between said Leonard and said Ulen for the purpose of and as a means whereby the value of the said property so conveyed over and above the recited consideration should be moved beyond the reach of complainant as a creditor of the said Leonard, and that said deed was executed and delivered by the said Leonard for the purpose of hindering, delaying, or defrauding the complainant in the collection of its indebtedness, and that the said Ulen had notice of

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or participated in said fraudulent intent or purpose, or was in possession of or had notice or knowledge of facts or circumstances which, if diligently followed up, would have been sufficient to have put a reasonably prudent man on notice of the said fraudulent intent and purpose of the said Leonard to put his assets beyond the reach of his creditors by the execution of said deed, and complainant avers the truth to be that the property described in said deed from Leonard to Ulen is in fact worth several times over the recited and expressed consideration in said deed."

The following demurrers were filed to the bill: "(1) The bill is without equity; (2) it is multifarious in that it seeks to establish more than one cause for relief, and the several grounds of relief are alleged in the alternative and constitute inconsistent rights to relief; (3) the bill shows that respondents are guilty of no wrongful or inequitable acts; (4) the bill is repugnant in that it alleges specifically the consideration for the conveyance or sale, and that there is no consideration.

N. B. FEAGIN, for appellant. The averments are in the alternative and inconsistent, and the bill was subject to demurrer for multifariousness.—*Caldwell v. King*, 76 Ala. 149; *Ward v. Patton*, 75 Ala. 207; *Micou v. Ashurst*, 55 Ala. 607. The averments of notice and fraud are not sufficient.—*McCrary v. Burney N. Bank*, 116 Ala. 228; *Loucheim & Co. v. 1st Nat. Bank*, 98 Ala. 524; *Henry v. Tenn. S. Co.*, 164 Ala. 376. Under the averments of this bill, respondent grantee would be entitled to reimbursement for moneys paid by her which inured to the benefit of complainant.—*Clements v. Nichols*, 73 U. S. 229. The bill therefore fails to offer to do equity.—*Marks v. Clisby*, 130 Ala. 502.

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F. E. BLACKBURN, for appellee. The bill was not multifarious.—*Lehman v. Meyer*, 67 Ala. 396; *Meyers v. Martinez*, 172 Ala. 641. The bill sufficiently charged notice of the grantee's knowledge of the grantor's fraudulent intention.—*Carter v. Coleman*, 82 Ala. 177.

SOMERVILLE, J.—With respect to the conveyance from Leonard to Ulen, the bill of complaint seeks a single relief, annulment, and upon a single ground, that it was made to hinder, delay, or defraud a creditor. Such a bill is not multifarious whatever may be its averments of fact.

Several theories as to the real consideration for the conveyance, each clearly indicative of fraud, are charged in the alternative; but these are mere specifications of the evidence in support of the charge, and, however numerous and inconsistent they may be, their alternative averment is proper, and in no sense does this destroy the singleness of the bill or render it self-repugnant. *Rives v. Walthall*, 38 Ala. 328; *Lehman v. Meyer*, 67 Ala. 396; *Ward v. Patton*, 75 Ala. 207; *Meyers v. Martinez*, 172 Ala. 641, 55 South. 498.

The averment that the grantee shared in or had notice of the grantor's fraudulent purpose, or had knowledge of fact sufficient to inform her of that purpose if diligently followed up by her, charges wrongful conduct on her part sufficient to avoid the conveyance.—*Carter v. Coleman*, 82 Ala. 177, 2 South. 354.

There is no merit in any of the grounds assigned, and the demurrer was properly overruled.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SAYRE, JJ., concur.

[Reid v. Allen.]

Reid v. Allen.*Bill for Specific Performance.*

(Decided June 5, 1913. 62 South. 801.)

1. *Homestead; Exemptions; Conveyance; Right to Raise Objection.*—No one but the husband or wife in whose interest a homestead exemption is declared by positive law, or those standing in privity with them in regard to the homestead, or having a valid lien thereon, can question the effect of a transfer of the property subject to the homestead right by the husband or wife without a joinder of the other.

2. *Same; General Creditors.*—Those without a valid lien on the subject of conveyance—that is general creditors—cannot question the irregularity of the conveyance of a homestead arising by reason of the fact that the debtor's wife did not join in the conveyance.

3. *Same; Conveyance by Husband; Validity.*—A conveyance of the subject of a homestead right by a husband alone is not void, but voidable, and that only at the instance of one having a right to have the conveyance pronounced void.

4. *Specific Performance; Transfer by Husband; Validity; Right to Question.*—Where a vendee holding under bond for title took possession of the land and impressed it with a homestead character, and then transferred his interest therein by an assignment of the bond in which his wife did not join, the failure of the wife to join could not be urged as a defense to a suit for specific performance filed by such transferee against the vendor of the transferor.

APPEAL from Randolph Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by H. C. Allen against J. W. Reid to enforce the specific performance of a contract to convey land. Judgment for complainant and respondent appeals. Affirmed.

STELL BLAKE, for appellant. No brief reached the Reporter.

R. J. HOOTEN, for appellee. No brief reached the Reporter.

McCLELLAN, J.—In the year 1906 J. W. Reid sold to S. J. Toney a tract of land containing about 65 acres.

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The purchase price was to be paid in three installments of \$200 each, payable annually. Reid executed to Toney bond for title, conditioned to make conveyance upon Toney's payment of the purchase price of the land. After two installments had been paid, Toney, for a valuable consideration, transferred, in writing but informally, the bond for title to H. C. Allen. In this transfer the wife of Toney did not join. Toney was at the time occupying, with his wife, the land as a homestead. Allen later paid to Reid the remainder of the purchase money. This bill, exhibited by Allen, seeks the specific performance of the contract by Reid—the conveyance of the land to Allen according to the stipulation of the bond for title so transferred by Toney. The relief sought was granted, and the vendor, Reid, appeals.

It is insisted that the decree is affected with error for that the transfer of the bond for title by Toney to Allen was and is void, because the wife of Toney did not join in the *alienation* as required by law with respect to the homestead of a resident of this state. Under the circumstances indicated, it may be that the transmission of the rights of the vendee, who has so impressed the premises with a homestead character, to be wholly effectual, must be joined by his wife, with all the formality usual in conveying a homestead held in fee. See 21 Cyc. pp. 534, 535; 16 Am. & Eng. Ency. Law, pp. 668, 669; *Watts v. Gordon*, 65 Ala. 546; contra, perhaps, see *Cochran & Ramsey v. Adler*, 121 Ala. 442, 445, 25 South. 761, particularly last paragraph. However, it is entirely unnecessary, in this instance, to enter upon the consideration of that inquiry.

The vendor, Reid, was and is a stranger to any *homestead* right or interest Toney and his wife had in the premises. Only the husband and wife, in whose inter-

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est the homestead exemption is raised by positive law, or those standing in a relation of privity to them in respect to the *homestead*, or having a valid lien thereon, can question the sufficiency of the means employed to effect an alienation of the subject of the homestead right. *Cobbey v. Knapp*, 23 Neb. 579, 592, 37 N. W. 485; *Parks v. Hartford Ins. Co.*, 100 Mo. 373, 380, 12 S. W. 1058; 21 Cyc. pp. 557, 558; 15 Am. & Eng. Ency. Law, pp. 687, 688.

General creditors—creditors without a valid lien on the subject of the homestead right—cannot question the irregularity of the conveyance thereof that arises by reason of the failure of the wife to join in the conveyance.—Author. *supra*.

A conveyance of the subject of the homestead right by the husband alone is voidable—not absolutely void—at the instance of one with right to have such a conveyance pronounced void.

The appellant cannot invoke judicial powers in the premises, since he is a stranger to the right he would indicate, a right which those in whose favor it existed have not seen proper to ascertain or claim in this instance.

It is objected, but without demurrer to point the objection, that the surviving widow of H. C. Allen, deceased, in whose name, along with the heirs at law, the cause was revived, was improperly joined as a complainant. If otherwise tenable, the objection was waived by failure to seasonably raise it.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMMERVILLE, JJ.,
concur.

[Williams v. Williams.]

Williams v. Williams.*Bill to Correct Description of Deed.*

(Decided June 19, 1913. 62 South. 843.)

Reformation of Instrument; Evidence; Mistake.—The evidence examined and held sufficient to sustain the finding of the Chancellor that an exception in the deed of three-fourths of an acre was intended to be an exception of only a one-half interest in that three-fourths of an acre, which the grantor had conveyed to another theretofore.

APPEAL from Lauderdale Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by W. R. Williams against R. L. Williams to correct a description in a conveyance of land. From a decree granting the relief prayed the respondent appeals. Affirmed.

The deed from R. L. Williams and wife to W. R. Williams contained the following description of the land conveyed: "The N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, sec. 27, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, sec. 32, all in township 1, range 7 west, containing 80 acres, more or less, except $\frac{3}{4}$ of an acre in the N. W. corner of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, sec. 27, township 1, range 7 west. A right of way is allowed on the three-fourths of an acre for a millrace, also through the tract of land, together with the appurtenances thereunto belonging."

MITCHELL & HUGHSTON, for appellant. The burden was on complainant to satisfy the court as to the mutual mistake, and this burden was not carried.—*Hammer v. Lange*, 56 South. 573; *Greil v. Tillis*, 54 South. 524.

A. A. WILLIAMS, for appellee. The evidence is sufficient to sustain the finding of the chancellor.—*Walker v. Frierson*, 60 South. 57; *Sims Ch. sec. 489*, et seq.

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McCLELLAN, J.—W. R. Williams (appellee) filed this bill against R. L. Williams (appellant) for the purpose of having a certain conveyance of land, executed to complainant by respondent, corrected in respect of the description of an half interest in three-quarters of an acre in the northwest corner of the southwest quarter of the southwest quarter of section 27, township 1, range 7 west, in Lauderdale county, Ala. The theory of the bill is that the error mentioned was the result of mutual mistake of the parties. The chancellor accorded the relief prayed.

The only assignment of error urged in brief for appellant is that presenting for review the soundness of the chancellor's conclusion upon the evidence, his finding of fact. The earnest insistence of appellant's solicitors to this end has been carefully considered in connection with the whole evidence and so in the light of the applicable rules of law, including the degree of certainty in the proof in order to invite or justify relief in such cases, reiterated in *Hammer v. Lange*, 174 Ala. 337, 56 South. 573. After such consideration we are not convinced, though the evidence is keenly conflicting at several material points, that the chancellor's conclusion is founded in error.

W. R. Williams (complainant) is the father of R. L. Williams and W. J. Williams. The father was about 75 years of age when the conveyance in question was executed. The son W. J. Williams attended to the transaction for the father. The relations between these sons had not been friendly, much less brotherly. One Birch appears to have participated in the negotiations for the sale of the lands, though W. J. and R. L. Williams later effected the trade without an intermediary. According to the testimony of Birch—and as to this there is no dispute in the evidence—the land in contro-

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versy was a part of "the old home place of W. R. Williams that he lives on now." In the year 1901, the father conveyed 80 acres, including the land in question, to R. L. Williams. In the year 1903 R. L. Williams conveyed an half interest in the three-quarters of an acre above described to W. J. Williams. On this lot a storehouse was built. September 9, 1907, the conveyance here sought to be corrected was executed.

The report of the appeal will contain the quotation of that part of the instrument descriptive of the subject of the conveyance, including the exception and the *allowance* of the right of way for millrace.

The particular point at which complainant claims error intervened is in respect to the exception from the conveyance of a half interest in the three-quarters of an acre; his contention being that the intent, common to both parties, was to convey *back* to the father all the land received from him in 1901, except the half interest in the fractional plot which R. L. had conveyed to W. J. Williams in 1903.

R. L. Williams, his wife, Lina Williams, and the justice who wrote the deed, each testifies that the instrument accorded with the agreement of the parties (the father acting through W. J.) and directions given for the preparation thereof. On the other hand, W. J. Williams testified that the agreement was as complainant contends, while Luke Williams and J. C. Birch testify to matters confirmatory of complainant's contention. Birch, at the instance of R. L. Williams, bore a proposition for a sale *back* by the latter. This proposition did not contain the exception here involved. Birch and Luke Williams do not appear to have any interest in the contest, or such vitiating prejudice as would reflect upon their credibility—certainly not to the extent or degree of that necessarily entertained by R. L. Wil-

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liams or his wife. To the justice there may be naturally imputed at least a degree of partiality toward the maintenance unimpaired or unchanged of his product. Nevertheless, if we treat the respective testimony on the particular controlling issue of what the agreement was, as being in equipoise, the circumstances must and do cast the result as the chancellor found and enforced it.

In the first place, it is easy to conceive, on the evidence, that the scrivener confused the half interest in the plot conveyed in 1903 by R. L. to W. J. Williams with the reservation or exception, in this relation, he wrote in the instrument. While it should have occurred to all that no reservation or exception, by the grantor of the interest conveyed in 1903 to W. J., was at all appropriate to the conveyance *as such*, yet from the evidence it readily appears that this previous conveyance to W. J. was constantly in the minds of the parties, minds not accustomed to consider legal effects. The deed (of 1907) itself reflects upon its own accuracy as a memorial when it is noted that the consideration recited is \$500, whereas all the parties agree that \$600 was the consideration paid to R. L. Williams. Aside from the evidence bearing immediately upon the issue of what the agreement was, it is not possible to read the evidence without concluding that the first and pervading suggestion or motive for a sale and purchase was to restore the land to the status of ownership existing when the 1901 deed was made, excepting of course the change made by the conveyance to W. J. by R. L. in 1903. To take out of this general purpose any part of the land (other than that conveyed in 1903), an exception must have been made. To effect this was to leave R. L. with an undivided half interest in the "storehouse lot," which, under the evidence, appears

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to have had a very respectable relative value. R. L. testified that he sent Birch with this proposition: That "he would take \$600 for the land." Such was Birch's testimony. This offer contained no exception. "For the land" evidently comprehended *all* R. L. could convey. He testified further: "After they had gone it occurred to me that I could not deed all of this land back, as I had some time before deeded W. J. Williams a half interest in the storehouse lot, being the three-fourths of an acre excepted from the deed." He further testified that subsequently he told to W. J. that he had decided to "leave out the three-fourths of an acre from the deed," and that W. J. agreed. This is denied by W. J.

In this state of the evidence the conduct of R. L. Williams with respect to the storehouse lot, its care and rental, impresses us as being of large importance and just influence in its effect upon the solution of the issue. While R. L. Williams testified that he repeatedly claimed a half interest in the storehouse lot and demanded a moiety of the rent from two of the tenants therein—tenants put there by the complainant or his agent—the evidence, as a whole, leaves no doubt that there was a considerable period after the deed was executed when his inaction consisted only with the notion that he had parted with his entire interest in the land conveyed to him by his father in 1901. There is no explanation of this silence on his part than that he thought his entire interest had been conveyed. It is not conceivable that an owner, even in part, would be so indifferent, not only as to who was, or were, the tenants of joint property, but also as to the rental contract and its terms.

We have again considered our ruling in the case of *Greil v. Tillis*, 170 Ala. 391, 54 South. 524. The facts

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there passed upon are, as there appears, very different from those here under view.

The decree is affirmed.

Affirmed.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ., concur.

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(Two cases.)

Bill for Contribution and Redemption.

(Decided June 17, 1913. 62 South. 951.)

1. *Mortgages; Foreclosure; Redemption.*—Where an heir acquired an interest in lands of his ancestor subject to mortgage and adverse to his co-heirs, under such circumstances that the title thus acquired inured to the benefit of the co-heirs, a bill praying that the court apportion to each of the heirs the amount which each should contribute for the redemption of the land from the mortgage, with reference to a contract of partition between the heirs, is a bill to redeem the entire tract, and not objectionable as a bill to redeem a fractional part.

2. *Same; Real Property; Action Against Heirs; Cross Bill.*—Where the action was by the other heirs to have the court determine the amount to be contributed by each to redeem the land from the mortgage, with interest, a cross bill by the administrator insisting that the lien be considered in determining that question, contains equity relative to the subject of the original bill, to prevent further litigation, and accounts will be stated between the heirs for the liens not exceeding the value of the land received by each under the contract of partition.

3. *Executors and Administrators; Accounting; Agreement by Heirs; Construction.*—Where an agreement between heirs provided that the administrator should make a final settlement without taking account of the lands formerly belonging to the estate, nor of the rents due therefrom except for two specified years, and no account of the debts charged upon that land; further providing that the administrator should charge each heir with the amount of rents received by him, and credit himself with the amount disbursed from moneys received from the estate otherwise than the proceeds of the land, but that no debt due from anyone of the heirs to the estate should be charged against any of the interest which the heirs might have in the assets of the estate, and providing for a voluntary partition of

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the land, and that the amount found due from each heir on the settlement of the estate should constitute a lien on the land set apart to such heir; the plain terms of the first two paragraphs will be construed to relieve the administrator as such of any obligation in respect to the individual indebtedness of the heir, and to prevent a setting up of such indebtedness as against the distributive share in the other property, aside from the land, but not to extinguish the lien against the land, in order to give effect to the plain terms of the last paragraph of the agreement.

4. *Limitation of Action; Enforcement of Lien on Real Property.*—Under the agreement in this case, where the other heirs sought a decree determining the amount each should be required to contribute to redeem the land from the mortgage, a cross bill by the administrator seeking to have the indebtedness of the heirs considered in determining the amount of such contribution, was the assertion of the lien upon the land created by the agreement, and not a right to recover upon the indebtedness, and was therefore not barred in less than twenty years from the time that amount of indebtedness was determined.

5. *Descent and Distribution; Heir's Action; Lien; Laches.*—Where the heirs waited fourteen years before attempting to enforce their lien under the agreement in this case, but there had been no adverse assertion of rights or prejudicial delay, and the heirs owed no indebtedness, such lien was not concluded by laches.

6. *Same.*—Where the other debts against the estate had been paid or were barred, each heir might assert his right to the beneficial interest in one-fourth of the liens created by the agreement, without recourse to an action through the personal representative of the ancestor.

7. *Same; Contract Between Heirs; Construction.*—Under the agreement in this case the decree erroneously charged one of the heirs, other than the administrator, with the rent of part of the land for certain years, not specified in the agreement.

APPEAL from Jackson Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by G. B. Caldwell and another against D. K. Caldwell and another, for a decree determining the shares which the several parties should contribute for the redemption of certain lands from a mortgage. From the decree of the chancellor, both parties appeal. Reversed and remanded on both the main and cross-appeals.

See, also, 5 Ala. App. 428, 59 South. 711.

The agreement, with the exception of the fifth section, alleged to have been entered into between the

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parties, is as follows: "This agreement made and entered into by and between D. K. Caldwell, S. Almena Caldwell, George B. Caldwell, and Europe H. Caldwell, witnesseth: (1) D. K. Caldwell shall make a final settlement of the estate of Hamlin Caldwell, deceased, taking no account of the land formerly belonging to said estate, nor the rents due from the said land except for the years 1895 and 1896, and likewise taking no account of the debts which are charged upon said land covered by the Butler mortgage debt, etc. (2) That said D. K. Caldwell shall account for the rents for the years 1895-96, and charge each heir with the amount of rents received by him as so much advanced and paid to the heirs so receiving said portion of rents, crediting himself with the amount disbursed by him, if anything, out of his individual means or moneys received from said estate otherwise than above excepted as the proceeds of the land, and that he shall likewise charge each heir on said settlement any advancement by Caldwell to said heir; but no debt that may be due from any one of said heirs to the estate of Hamlin Caldwell shall be charged as against any interest which said heir may have in the assets of said estate, or which may have been or may hereafter be derived directly or indirectly from the land formerly belonging to the estate of Hamlin Caldwell, which was sold and conveyed by J. E. Butler to Sallie B. Brown. (3) It is further agreed that W. B. Bridges shall select one man, or three men, as he may think best, to value all the real estate formerly owned by Hamlin Caldwell, and which was conveyed by J. E. Butler to Sallie B. Brown, and to value each lot or tract separately, and that the man or men so appointed shall take from the whole tract or from the different tracts or parcels of tracts an amount of land sufficient in value, which according to their

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best judgment will be sufficient in three years from the date of this agreement to yield the amount which may be necessary to pay the debt to Sallie B. Brown and repurchase said land. Said land to be selected so as to cause the least detriment to the whole tract, which said land when so set apart to pay said debt, shall be placed in the custody of the trustee to be by him managed and so sold at any time within three years, and out of the proceeds pay said Sallie B. Brown the debt or so much thereof as the proceeds of the land will pay. Said trustee shall likewise manage and control said land, and receive said rents and pay the same to Sallie B. Brown to be credited on said debt, up to the time when the same shall be sold. It shall be the duty of said trustee in making said sale to price to each of the four heirs therein named all the prices offered for said land, and give the persons herein named opportunity to take the land at the prices offered, but should either one of them be willing to pay more than the price offered, the same shall be entitled to it, providing satisfactory arrangements for the payments are made in regard to it. Said trustee is hereby authorized to sell said land publicly or privately as he may deem best, provided he gives a notice as herein provided and the opportunity to take said bid, and we each agree to sign a conveyance to such person or persons as the trustee may sell the land to at the price agreed on by him. (4) Of the land remaining after said sale has been made to pay said debt; the remainder shall be divided into four parts, each part of which shall be (valued by said appraisers aforesaid and each of the said four heirs shall be) entitled to one of the parts so set apart and shall have that portion as their part which may be designated by said appraisers if said heirs shall be unable to agree upon their respective parts so set apart; but each heir shall take

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said one-fourth portion of said land charged with whatever balance may be ascertained to be due on the settlement of D. K. Caldwell in the probate court from prior advancements or paid him from said estate, and the same shall be subject to said debt before the title shall vest in him or her, but the whole shall be subject to the prior debt due Sallie B. Brown. * * *

(6) If the amount paid aforesaid shall not be sufficient to pay the same, then said trustees may take a portion of the land off of each of the divisions hereinbefore stated as nearly equal as may be convenient, and sell the same until an amount sufficient has been realized to pay the debt of Sallie B. Brown. The amount found due on the settlement of D. K. Caldwell in said probate court, due from each heir of the estate is hereby declared a lien and charge on the interest set apart to such heir, and in default of payment, said interest may be sold, and the amount remaining after paying said debt shall go to the heir aforesaid." Signed by each of the parties above named, on the 8th day of February, 1897.

MILO MOODY and W. H. NORWOOD, for appellant. Some of the history of this case may be found in the case reported in 121 Ala. 598. While appellants insist that complainants had no legal or equitable right to redeem yet having redeemed or having sought to do so, there should be an accounting to ascertain the sum of money that each respectively owe the estate that it may be known just how much each of them ought in equity and justice to contribute.—*McCurdy v. Streety*, 104 Ala. 493; *Comer v. Sheehee*, 129 Ala. 588; *Nelson v. Murphy*, 69 Ala. 598; *Brown v. Lang*, 14 Ala. 719; *Goodman v. Benham*, 16 Ala. 625. The chancellor erred in sustaining demurrers to the cross bill and in dismiss-

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ing the same because of limitations or laches.—*Noble v. Tate*, 37 South. 278. The award stood as the judgment of the court.—Sec. 2922, Code 1907. There was no laches or staleness of demand.—*Haney v. Legg*, 129 Ala. 625. Equitable liens are enforceable in a court of equity.—*Ross v. Perry*, 105 Ala. 533. Such liens are not lost by reducing the claim to judgment.—*Caldwell v. Smith*, 77 Ala. 168; *Pritchett v. Sibert*, 75 Ala. 315; *Robinson v. Pebworth*, 71 Ala. 240; see generally former appeal in this case in 55 South. 515.

TALLEY & FRICKS, and S. S. PLEASANTS, for appellee. Some of the matters of complaint have been adjudicated on former appeal.—*Caldwell v. Caldwell*, 55 South. 515; s. c. 121 Ala. 598. The probate court ascertained that the indebtedness of appellees was in excess of the distributive share and excluded them from participating in distribution on final settlement.—Authorities supra; sec. 240, Code 1896. The original claim was extinguished by the award, and a suit should have been based on the award.—2 A. & E. Enc. of Law, 798; 3 Enc. P. & P. 129 Ala. 131. Equity will not interfere in such matters where the party seeking its aid has been guilty of gross laches or long voluntary delay.—Sec. 3091, Code 1907; *Thompson v. Parker*, 68 Ala. 387.

McCLELLAN, J.—Hamlin Caldwell died September 3, 1895. Four heirs survived him, viz., G. B. and E. H. Caldwell (complainants) and D. K. and S. Almena Caldwell (respondents). Decedent was a large landowner. He was indebted to J. E. Butler, to whom he had executed two mortgages on lands described in this bill. On December 28, 1896, Butler assigned these mortgages to Sallie B. Brown, and also made to her a quitclaim to the land described in them. On November

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21, 1898, Sallie B. Brown assigned the mortgage and executed an appropriate quitclaim to A. H. Moody (respondent). D. K. Caldwell was constituted the administrator of his father's estate on September 26, 1895. On February 8, 1897, the heirs of Hamlin Caldwell executed an agreement. The report of the appeal will contain it, omitting the fifth section and the formal parts thereof, not important on the present review. Under this agreement the lands were divided, and each party took possession of the part so allotted; and the lot (1), from the proceeds of which it was contemplated the debts would be paid, was likewise set apart. On June 18, 1896, pursuant to agreement theretofore entered into by all the heirs (except S. Almena, who was not indebted in any form to Hamlin Caldwell or his estate), W. H. Norwood, as an arbitrator, ascertained and reported the respective indebtedness of G. B., E. H., and D. K. Caldwell to the Hamlin Caldwell estate. This award was affirmed to be binding on the parties. —*Caldwell v. Caldwell*, 121 Ala. 598, 25 South. 825. However, it was also therein ruled that the probate court was without power to further adjudge, in the premises afforded by the award, than that the indebtedness of an heir to the estate was equal or exceeded the distributive share of such heir in the estate. Repetition of the particular facts set forth in the report in 121 Ala. 598, 25 South. 825, is not necessary. Reference thereto will suffice.

On October 11, 1902, Aultman Company, a creditor of the Hamlin Caldwell estate, filed a bill with the ultimate purpose of collecting its claim. The heirs and A. H. Moody were made parties thereto. A consent decree was entered October 22, 1904, whereby a sale of the lands for satisfaction of the Moody and Aultman Company debts was ordered, and later had. At this

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sale Moody bid the agreed sum of \$16,000, covering the debts and costs, and took conveyance of the land. In May, 1905, Moody, for the same consideration bid by him, conveyed all the lands to D. K. Caldwell, taking a mortgage back thereon for that sum. On a former appeal in this cause (173 Ala. 216, 55 South. 515), where a further report of the facts and of the nature of this bill is made, it was ruled, in effect, that the reconveyance by Moody to D. K. Caldwell revived the relation of cotenancy existing between Hamlin Caldwell's heirs before the sale under the mentioned consent decree, that, if the other heirs so elected (D. K. early purchased the rights of Almena in the lands), they were entitled to redeem from A. H. Moody under the D. K. Caldwell mortgage, and, further, that the complainants had not so delayed as to be barred by *laches*. The conclusion that the cotenants were entitled to redeem was predicated of the relation, and not of the agreement alleged in the bill, viz., that Moody would buy at the sale under the said agreed decree, and the heirs would be allowed a definite number of years to redeem or repurchase the lands so sold. We are not now disposed to disturb the stated rulings on former appeal.

While the amended bill invokes the court's powers to ascertain, as between G. B., E. H., and D. K. Caldwell, the respective proportion each should contribute to ultimately effect redemption of the lot, which was assigned to him under the agreement before mentioned, yet the predominating prayer, in respect of redemption, is that the redemption should be of the whole land from Moody, the mortgagee. There is no proposal to only redeem a part of the land *from Moody*. The entire consequence of the amended bill's reference to the several lots assigned, under the agreement, to the heirs was to apportion, or to afford opportunity to apportion, the

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aggregate of the D. K. Caldwell mortgage debt to Moody among the heirs in the proportion they should each contribute to effect a single, completed redemption. Hence the amended bill does not offend the rule, reiterated in *McQueen v. Whetstone*, 127 Ala. 417, 30 South. 548, that fractional redemption of lands covered by a mortgage is not allowable.

The agreement of February 8, 1897, as we construe it, imposed upon the respective lots assigned thereunder to G. B., E. H., and D. K. Caldwell a contract "lien and charge" to assure (if of course the indebtedness of Hamlin Caldwell's estate was discharged) the payment of the individual debt of each of said heirs to the estate of Hamlin Caldwell. The last paragraph of the agreement of February 8, 1897, removes all doubt on this score. It is plain, unequivocal. The evident intent of the *first* and *second* sections of this agreement was to relieve the administrator as such (D. K. Caldwell) of any obligation in respect of such individual indebtedness of the heirs, and to eliminate such indebtednesses from any effect to toll or extinguish the distributive shares of each, respectively, in the "assets of said estate" other than the lands which, except as to certain rents, were lifted out of the administration. If the agreement was interpreted as having no reference to that individual indebtedness, the result would be, clearly, to strike therefrom the last paragraph in section 6 thereof, a provision that is too plain to be mistaken. It is not to be supposed that parties intend to incorporate in written agreements contradictory provisions. The construction stated above averts the possibility of such a result, and in so doing the language of the instrument is in no wise departed from, nor an intent supplied where none was expressed.

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While concluding that the probate court was without jurisdiction to render a personal judgment for the excess of an indebtedness of an heir or distributee to the estate over the distributive share to which such heir is entitled, this court in *Caldwell v. Caldwell*, 121 Ala. 598, 25 South. 825, affirmed as stated before, the binding quality of the *award*, closing the opinion with this expression: “* * * Upon this award the court could have properly ascertained the amount of appellant's (E. H. Caldwell) indebtedness to his father's estate to be the sum named in the decree.” The award of June 18, 1896, which passed into the probate decree considered in *Caldwell v. Caldwell*, 121 Ala. 598, 25 South. 825, found the three heirs indebted to the estate in these respective sums: D. K. Caldwell, \$1,827.74; G. B. Caldwell, \$3,122.02, and E. H. Caldwell \$27,528.55. By his amended answer, which was constituted a cross-bill for the purpose to be stated, D. K. and Almena Caldwell sought to have the said indebtedness of the complainants (G. B. and E. H. Caldwell) reckoned with in ascertaining the amount, *as between the heirs*, each should contribute to effect the redemption sought by the amended original bill. The view prevailed that at best the statute of limitations of 10 years barred the remedy the amended cross-bill would, in this relation, have asserted. Approximately 14 years elapsed between the rendition of the award and the filing of the amended cross-bill. The object of the amended cross-bill was to interpose, *as between the heirs*, and upon the adjustment the amended original bill invoked in respect of the pro rata sum each should contribute to the redemption from Moody, the lien established by the agreement of February 8, 1897, upon the respective lots of the land assigned thereunder to each heir; and *not* the assertion of a right of recovery

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upon the indebtednesses, confessedly not paid, the complainants owed the Hamlin Caldwell estate. Hence, short of 20 years the remedy sought by the amended cross-bill was not barred.—*Ware v. Curry*, 67 Ala. 274, 283, et seq. It need hardly be added that the relief sought by the amended cross-bill was not based upon the *award*, though that pronouncement, in respect of the individual indebtednesses, afforded the ascertainment of the respective sums due by three of the heirs (the other being unindebted to the estate), and thus operated to establish the amounts for the discharge of which the respective liens, created by the last paragraph of the agreement of February 8, 1897, should furnish security. We can see no basis for an imputation of concluding *laches* to D. K. and Almena Caldwell, or either of them. There has been no adverse assertion of rights or attendant *prejudicial* delay.—*Haney v. Legg*, 129 Ala. 625, 30 South. 34, 87 Am. St. Rep. 81.

From the amended cross-bill it appears that the estate of Hamlin Caldwell was finally settled in the probate court during the year 1897. It is to be assumed that all debts against that estate of Hamlin Caldwell, other than the indebtedness which entered into the sum (\$16,000) bid by Moody at the chancery sale have been either paid or have become barred before the amended cross-bill was filed. Under these circumstances the unqualified beneficial right to the respective lien created by the agreement of 1897 to secure the indebtedness established by the award is with the heirs of the decedent in proportions of one-fourth each; and, consistent with the doctrine of *Noble v. Tate*, 119 Ala. 399, 24 South. 438; s. c. 140 Ala. 469, 37 South. 278; one, an heir, so entitled may appropriately assert his right without recourse to an action or actions through a personal representative.

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The amended cross-bill asserted, it seems to us, manifest equity. The recognition and effectuation of this equity in this cause, to the subject of which it is so intimately related, will facilitate the final adjustment of the rights of the parties and prevent further litigation, which must result if the enforcement of the *lien* each heir has upon the allotment of land to each of the others is relegated to a distinct proceeding in a court of equity. No injustice can attend the process. The accounts should be stated between the lienholders in the proportion of one-fourth to each and of three-fourths against each. Since it appears that the indebtedness of D. K. Caldwell is less than that of either G. B. or E. H. Caldwell, and that Almena Caldwell was without indebtedness to the estate, the contribution, for redemption, by each complainant should be tolled by his respective one-fourth interest in the amount due from D. K. Caldwell; and, to accomplish the proper relief, the right of each complainant to contribute to and effectuate the redemption should be conditional upon satisfaction, by each complainant, of the proportionate pecuniary interest D. K. has in the *lien* created by the agreement of February 8, 1897, on the land allotted to the complainants, respectively, but limited in amount to the value of the land, when the agreement was made (February 8, 1897), so allotted to each of complainants.

According to the terms of the agreement of February 8, 1897, the charges for *rents* were restricted to two years, therein stated. Our opinion is the chancellor erred in charging G. B. Caldwell with the amount of the rents of the "home place" from 1897 to 1912. The agreement contemplated that the rents of "1895 and 1896" should be charged up and disposed of in the final settlement of the administration in the probate court. Accordingly it does not appear that the rents or use of

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the "home place" should have effect in *this* accounting.

Otherwise than indicated in this opinion, no fault appears in the decree appealed from. It therefore is reversed to the end only that an accounting may be had between the heirs consistent with the conclusions hereinabove set down. The cause is remanded. The costs of the appeal will be equally apportioned between the appellants and the cross-appellants.

Reversed and remanded, on both the main and cross-appeals.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ.,
concur.

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Bill for an Accounting.

(Decided June 5, 1913. 62 South. 784.)

1. *Guardian and Ward; Sureties; Conclusiveness of Adjudication Against Guardian.*—A settlement in the probate court by the administrator of a deceased guardian was *res inter alios acta* as to the sureties of the guardian, and the decree was not binding thereon.

2. *Same; Liability of Surety.*—After the death of the guardian the liability of his surety can be determined only by bill in equity.

3. *Same.*—Where the decree in the probate court on the settlement of an administrator of a deceased guardian was nearly fruitless because of the insolvency of the guardian, a bill in equity could be maintained against the guardian's sureties.

4. *Same; Parties.*—The personal representative of a deceased guardian was a necessary party to a bill in equity against the surety of the guardian to determine the liability of the surety.

5. *Same.*—On the bill and answer in this case complainants were entitled to an accounting, since a fiduciary relation appeared which involved the duty to account, and while, as a general rule, when a case is submitted on an unsworn bill and answer without testimony, and the answer is a responsive denial of all of the grounds of equity stated in the bill, it prevailed against the bill, where material matters are stated in the bill which *prima facie* are within the knowledge or information of respondent and the answer fails to deny them,

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or express a belief in their falsity or to state that respondent cannot form any belief respecting their truth they must be considered as admitted; in such circumstances a general denial or mere demand for proof is not a sufficient denial.

6. *Equity; Bill; Formal Decree.*—Where the contents of the omitted exhibit did not go to the essential equity of the bill, such omission did not render the bill demurrable, although a blank in a bill at a place where an exhibit was called for would have justified the granting of a motion to take the bill off the file.

APPEAL from Marshall Chancery Court.

Heard before Hon. W. H. SIMPSON.

Bill by Eva Pittman and another against the United States Fidelity & Guaranty Company and others, for an accounting. Decree for complainants and respondents appeal. Affirmed.

PHARES COLEMAN, and STREET & ISBELL, for appellant. The judgment or decree of a court of competent jurisdiction, whether the jurisdiction is exclusive or concurrent, not assailed on error on appeal to an appellate jurisdiction, is final and conclusive; and this finality or conclusiveness applies not only to the facts actually litigated and decided, but to all facts necessarily involved in the judgment or decree. *Waring v. Lewis*, 53 Ala. 615; *Otis v. Dargan*, 53 Ala. 178; *Waldrom v. Waldrom*, 76 Ala. 285; *King v. Smith*, 15 Ala. 270; *Watts v. Gayle*, 20 Ala. 826; *Allman v. Owen*, 31 Ala. 167; *Moore v. Lesueur*, 33 Ala. 237; *Duckworth v. Duckworth's Adm'r.*, 35 Ala. 70; *Barron v. Robinson et al.*, 98 Ala. 351; *Foshee v. McCreary*, 123 Ala. 493. Where in the chancery court a cause is submitted on the bill and answer, without the introduction of testimony, only those facts averred in the bill and which are admitted in the answer to be true can be looked to for the purpose of granting the relief prayed for in the bill. In the absence of an express admission in the answer, the complainant cannot look to any averment in

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the bill as the basis for relief. The burden is cast upon the complainant to prove every averment material to the equity of the bill or to the granting of the relief, where it is not expressly admitted in the answer. *Winter v. City Council of Montgomery*, 83 Ala. 589, 592; *Scott, Admr. v. Brassell*, 132 Ala. 660. 663; *Latham v. Staples*, 46 Ala. 462; *City of Mobile v. Fowler*, 147 Ala. 403, 407; *Robbins v. Battle House Co.*, 74 Ala. 499, 505.

JOHN A. LUSK & SON, for appellee. It is not necessary that the ages of complainant should be stated.—1 Dan. Ch. 203; Sims. Cha. 91; Rule 23, Ch. Pr. The question that the exhibit was not attached was not ground for demurrer, even if it could be otherwise reached.—Sec. 3144, Code 1907; Rule 64 Ch. Pr.; Sims Ch. 549. The execution of the bond and appointment of a guardian for more than one ward is without color of foundation.—*Brunson v. Brooks*, 68 Ala. 248. The only remedy complainants have is within this court.—*Presley v. Weakley*, 124 Ala. 153; *Street v. Henry*, 124 Ala. 153; *Martin v. Ellerbee*, 70 Ala. 326. An answer not under oath is not evidence for any purpose.—*Buchanan v. Buchanan*, 72 Ala. 55. Its admissions are conclusive against respondents.—*Thorington v. City of Montgomery*, 88 Ala. 548. The court had jurisdiction.—Secs. 4428, et seq., Code 1907. A fiduciary relation was shown demanding an accounting.—2 Pom. sec. 931; 4 Elliott, sec. 3220.

SAYRE, J.—Complainants (appellees), by their present guardian, filed this bill for an accounting against their former guardian, J. Grover Pittman, now deceased, and the Fidelity Company as surety on his bond. The deceased guardian is represented in the

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cause by the defendant Elrod, appointed to administer the former guardian's estate in succession to George E. Lee, after a decree of insolvency.

The settlement had in the probate court between these complainants and Lee, as administrator of the estate of the former guardian, and the decree there rendered were res inter alios as to the surety, the Fidelity Company. The surety was not, and is not, bound by any judgment or decree rendered against the personal representative of its principal. There was and is no remedy against the surety in a case of this character, involving the trust of a guardianship after the death of the principal, other than a bill in equity. There can be, after the death of the principal, no judicial ascertainment elsewhere of his liability which would conclude the surety.—*Martin v. Ellerbe*, 70 Ala. 326; *Street v. Henry*, 124 Ala. 153, 27 South. 411; *Presley v. Weakley*, 135 Ala. 517, 33 South. 434, 93 Am. St. Rep. 39. The fact that, under the statute, the ward may have execution against the surety on the guardian's bond, where the guardian himself has settled his trust in the probate court, does not give to the decree even in such case the force and effect of a judgment or decree against the surety, as was pointed out in *Smith v. Jackson*, 56 Ala. 25; *Chancy v. Thweatt*, 91 Ala. 329, 8 South. 283. The decree in the probate court having been fruitless, or nearly so, there can be no doubt of the general equity of the bill in this case against the surety, nor can it be questioned that the presence of the personal representative of the deceased principal is necessary. We are not required at this time to say what effect the probate decree may have in this cause in the way of limiting any decree that may result against the surety.

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In appellant's brief two minor points are taken against the form of the bill. They are without merit. Of one of them we will say that if the failure to attach an exhibit at the place where it was called for by the bill be considered as constituting a blank, the bill, for that reason, might have been taken off the file on motion under rule 10 of chancery rules of practice; but the contents of the omitted exhibit did not go to the essential equity of the bill, and this defect could not be reached by demurrer. *McKenzie v. Baldridge*, 49 Ala. 564.

The cause was submitted by complainants for a decree of accounting on the original bill and answer, with exhibits. No testimony was taken, nor did the defendants on their part add anything to the note of submission. The answer, which was not under oath, admitted the substance of paragraphs one and two of the bill, which was that the former guardian had been duly appointed and that the defendant Fidelity Company had become surety on his bond. Paragraph three of the bill averred that "the said J. Grover Pittman, as guardian of the estate of these several complainants, received large sums of money and large amounts of property, a part of the estate of these complainants." In the answer this was met by the general averment that the allegations of the paragraph of the bill in which it is found were untrue. Averments of the fourth and fifth paragraphs of the bill, to the effect that the former guardian died without having settled his guardianship, and that George E. Lee had been first appointed to administer his estate, were admitted to be true. Succeeding paragraphs set forth the facts, to state them in short: (6) That a decree had been rendered in the probate court in favor of complainants against said Lee; (7) that the former guardian's estate had been declared

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insolvent; (8) that defendant Elrod had been appointed administrator of the insolvent estate; (9) that defendant Elrod had made a small partial payment on the probate decree in favor of complainants; (10) that the present guardian had been duly appointed; (11) that the liability of the Fidelity Company as guardian had never been determined judicially or settled; and (12) that the separate interests of complainants had never been segregated. These averments the defendants neither admitted nor denied. They demanded strict proof of them. And now defendants say the court could not order them to an accounting without the proof.

Unquestionably the general rule is that when a cause is submitted on unsworn bill and answer without testimony, and the answer is a responsive denial of all the grounds of equity stated in the bill, such answer must prevail against the bill. *Latham v. Staples*, 46 Ala. 462. But where material matters are stated in the bill, which prima facie are within the knowledge or information of the defendant, if in his answer he fails to deny them, or to express his belief of their falsity, and does not state that he cannot form any belief respecting their truth, they must be considered as admitted. A general denial is insufficient. Still less will a mere demand for proof suffice. There should be a clear and distinct response to each averment of the bill; otherwise the answer will be construed against the defendant. *Grady v. Robinson*, 28 Ala. 289; *Smilie v. Siler*, 35 Ala. 88; *Moog v. Barrow*, 101 Ala. 209, 13 South. 665; *Mobile v. Fowler*, 147 Ala. 403, 41 South. 468. Applying these principles to the bill and answer as we have stated them, it is seen that enough appears by the defendant Elrod's express implied admissions to charge him as an accounting trustee. The Fidelity Company's

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suretyship for him is expressly admitted. Where a fiduciary relation appears, the duty to account is shown. A trustee is bound to account when the court of equity summons him to do so. Whether he ought to be charged will then appear.

The decree below will be in all things affirmed.

Affirmed.

DOWDELL, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

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Assumpsit.

(Decided May 15, 1913. 62 South. 812.)

1. *Mortgages; Nature of Instrument; Mortgage or Conditional Sale.*—Although the instrument attempted, in the printed part thereof, to reserve title to the property in the mortgagee until the debt was paid, it was a chattel mortgage and not a conditional sale where it was denominated a mortgage, recognized a debt to be paid by a definite time, provided for foreclosure under power of sale and stipulated for authority in the mortgagee to purchase at the sale, provided for the payment of an attorney's fee for collecting the mortgage, and covered crops to be raised during the year 1911.

2. *Frauds; Statute of; Guaranty.*—Where a guaranty against the default or miscarriage of another is executed before the delivery of the contract guaranteed, the consideration for the principal contract is sufficient to support the guaranty, and it is not within the statute of frauds; but if the guaranty is executed after the delivery of the principal contract, it is void under the statute of frauds unless the guaranty is itself supported by a distinct consideration expressed therein.

APPEAL from Madison Circuit Court.

Heard before Hon. A. H. ALSTON.

Assumpsit by the Holmes Furniture & Vehicle Company against W. P. Dilworth and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

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The complaint contained the common counts and certain counts declaring upon a special contract of guaranty, whereby the defendants guaranteed the payment of a note and mortgage executed by A. Y. Parker to plaintiff February 22, 1911, and payable to plaintiff on November 1, 1911. Pleas 10, 11, 12, 13, and 14 allege, in substance, that the guaranty was of a conditional sales contract executed by Parker to the plaintiff and that when Parker failed to pay the same, and before suit brought, plaintiff retook such personal property under said conditional sales contract, and hence has waived his right to maintain this suit. The contents of the paper sufficiently appear from the opinion, as do the other facts necessary to an understanding of same.

S. S. PLEASANTS, for appellant. Every special promise to answer for the debt, default or miscarriage of another is void unless some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing, and such seems to have been the statute since 1852. Code of Ala. 1907, Sec. 4289, and sections of former Codes there cited. The failure to express a valuable consideration for the promise is as fatal to its legal validity as would be the failure to reduce it to writing. *White v. White*, 107 Ala. 417; *Foster v. Napier*, 74 Ala. 393; *Lindsay v. McRae*, 116 Ala. 542. A guaranty written or a note after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it; and if such a guaranty does not express any consideration, it is void, where the statute of frauds in Alabama requires the consideration to be expressed in writing. The demurrer to replication No.

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3 was therefore improperly overruled and the general charge for plaintiff improper. *Rigby v. Norwood*, 34 Ala. 129; *Moore v. Lawrence County Bank*, 149 U. S. 298; *Speer v. Crowder*, 32 South. Repr. 658; *Hood v. Robbins & Smith*, 98 Ala. 484. The plea of want of consideration was fully sustained. *Hood v. Robbins & Smith*, 98 Ala. 484. Where a conditional sale of personal property is made the seller retaining the title and upon default in payment of the purchase price, retakes the property, he is thereby completely deprived of the right to enforce payment of the debt, and it was therefore error to strike pleas 10, 11 and 14. *Sanders v. Newton*, 140 Ala. 335; *Davis v. Millings*, 141 Ala. 378.

R. E. SMITH, for appellee. The instrument was a mortgage.—Jones on Chattel Mortgages, sec. 17; 4 Mayf. Dig. 195. The consideration was valid.—*Lefkovich v. First Nat. Bank*, 152 Ala. 521; *Martin v. Black*, 20 Ala. 309; *Merrit v. Coffin*, 152 Ala. 474. Under these authorities, the contract was one of absolute guaranty, and there was no error in overruling demurrers to plaintiff's special replication 3 and giving the general charge for the plaintiff.

McCLELLAN, J.—The propriety of the court's action in striking, in response to plaintiff's (appellee's) motion, pleas 10, 11, 12, 13, and 14 is confirmed when it is concluded, as doubtless the trial court did, that the instrument executed by A. Y. Parker to the appellee is a *mortgage* and not the evidence of a *conditional sale*. While in the printed part of the instrument (the original of which has been certified here) it is provided that the *title should remain in the appellee company* until payment of the "mortgage" was made, other features of the instrument unmistakably show that the employment of that provision was without the intent of

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the parties to constitute a conditional sale. The instrument recognizes a debt, to be paid by a definite time. It denominates itself a mortgage. It provides for a foreclosure sale, under a power of sale in the usual form, and stipulates for authority of the mortgagee to purchase at the foreclosure sale. It covers crops to be raised during the year 1911, and provides for the payment of an attorney's fee for the collection thereof, "this mortgage."

The pleas indicated proceeded on the assumption that a *conditional sale* was the legal effect of the instrument, whereas the declaration makes material averments to the effect that a *mortgage* was the creation and result of the instrument involved. If the legal effect of the instrument had constituted the transaction a conditional sale instead of mortgage, manifestly the defendants (appellants) would and could have had the full benefit of the matter under the general issue.

The plaintiff's action rests upon an asserted guaranty indorsed by defendants (appellants) on the back of a note and mortgage executed by A. Y. Parker to the plaintiff (appellee). It reads: "We hereby guarantee the payment of the within note & mortg., when same is due." The indorsement is without date. The note referred to was due November 1, 1911. The defendant set up, in pleas 4, 5, 6, and 8, the statute of frauds, alleging in each of them that the guaranty described was not executed contemporaneously with the execution of the note and mortgage or that it was subsequently executed, and that it did not express the consideration therefor. To each of these pleas separately the plaintiff replied, in replication 3 as follows: "The contract of guaranty executed by defendants was and is indorsed on the back of a note and mortgage executed by A. Y. Parker, which said note and mortgage ex-

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presses a valid consideration in law, and plaintiff avers that the guaranty of defendants was made to secure the debt of said A. Y. Parker as evidenced by said note and mortgage." The grounds of demurrer to this replication (3) were as follows: "(1) Said replication does not show that said guaranty contract was executed contemporaneously with the execution of said note and mortgage on which the same were written. (2) Said replication shows on its face that the guaranty contract was executed to secure the debt of A. Y. Parker, and that no consideration for such guaranty was expressed in the same." The demurrer was overruled, and that action is assigned and urged for error here.

Since pleas 4, 5, 6, and 8 expressly negative the points of objection taken in the grounds of demurrer to replication 3, it may be that no prejudicial error attended the action of the court in overruling the stated grounds of demurrer to the replication. However, counsel have not discussed this possibility in their briefs but have treated the questions involved as upon their merits. Plea 7 asserted summarily the want of consideration for the execution of the contract of guaranty sued on.

Where the contract of guaranty, against the default, miscarriage, or failure to pay, of another, is executed before the delivery of the contract, the performance of which the guaranty is intended to assure, and though indorsed thereon the consideration moving between the principals to the principal contract and therein appearing on its face will support the contract of guaranty, no other consideration is necessary, and the contract is not within the statute of frauds. But, where the guaranty is executed after the delivery of the principal contract, it is void under the statute of frauds unless the *contract of guaranty* is supported by a distinct considera-

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tion and that consideration is expressed in the contract of guaranty. *Moses v. Lawrence County Bank*, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743; *Rigby v. Norwood*, 34 Ala. 129; *White v. White*, 107 Ala. 417, 18 South. 3; *Foster v. Napier*, 74 Ala. 393; *Lindsay v. McRae*, 116 Ala. 542, 22 South. 868.

Special replication 3 was defective in that it omitted to aver that the contract of guaranty was executed before the delivery of the note and mortgage, the payment of which it purported to assure, or that its execution was contemporaneous with the execution of the note and mortgage.

Under the evidence, the court erred in giving the affirmative charge for the plaintiff. If the guaranty contract was executed after delivery of the note and mortgage, the plaintiff could not recover according to the doctrine of our cases, ante, interpreting and applying the statute of frauds. The evidence was, to state its effect most favorably to plaintiff, in conflict with the vital issues of when, with reference to the time of delivery of the note and mortgage, Dilworth and Finney signed the indorsements. The affirmative charge, of course, took from the jury the conclusion upon this phase of the issue and hence invaded the jury's province.

It is suggested in brief for appellee that the rulings of the court were thought to be in conformity with the holding in *Merritt v. Coffin*, 152 Ala. 474, 44 South. 622. Reference to that opinion will disclose that this court concluded that the principal and guaranty contracts were contemporaneously executed. That decision is without bearing upon the case at bar.

The judgment is reversed, and the case is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Easterwood v. Lay.]

Easterwood v. Lay.*Use and Occupation.*

(Decided June 19, 1913. 62 South. 787.)

Use and Occupation; Tenant's Rights; Evidence.—Where it appeared that when the tenant rented the land the preceding lessee pointed out the boundary as then understood by the parties, that he rented the track as agreed upon, and that even after his lessor discovered the mistake, it did not acknowledge plaintiff's claim to the land not occupied by him, plaintiff was not entitled to recover in an action for use and occupation of land which defendant had conveyed to the lessor of plaintiff, but which plaintiff had not been in possession of owing to a misunderstanding of the boundary line.

APPEAL from Gadsden City Court.

Heard before Hon. John H. DISQUE.

Action by W. E. Easterwood against W. P. Lay for use and occupation. Judgment for defendant and plaintiff appeals. Affirmed.

GEORGE D. MOTLEY, for appellant. Hostility to the title of the true owners is an essential element of adverse possession, and a possession cannot be adverse which in any contingency is intended to be in subordination to the true title.—*Ivey v. Beddingfield*, 107 Ala. 616; *Yancey v. S. & W. R. R. Co.*, 101 Ala. 234; *Williams v. Higgins*, 69 Ala. 517; *Chancellor v. Teal*, 141 Ala. 634; *Gulf Red C. Co. v. Crenshaw*, 148 Ala. 348. The facts supported the action for use and occupation.—*Catterlin v. Spinks*, 16 Ala. 467; *Price v. Pickett*, 21 Ala. 741; *Branch Bank v. Fry*, 23 Ala. 770; *Weaver v. Jones*, 24 Ala. 420; *Rushton v. Davis*, 127 Ala. 279.

HOOD & MURPHREE, for appellee. This action could not be maintained at the common law, and the statute

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prescribes the only case in which the action will lie.—*Lankford v. Green*, 52 Ala. 103; *Fielder v. Childs*, 73 Ala. 567; *Weaver v. Jones*, 24 Ala. 423. The language of the statute as amended is “when the defendant had gone into possession unlawfully,” and the facts do not make such a case.

SAYRE, J.—Appellant sued appellee for the use and occupation of something like 20 acres of land. Plaintiff added a count in which he alleged that defendant had received rents from lands which belonged to plaintiff and claimed a recovery of those rents as the equitable owner. The case was tried by the court without a jury.

Apart from any other consideration, we think the judgment must be affirmed on the ground that the trial court may well have found that plaintiff had no interest in the land out of which the controversy has arisen. No doubt the court found the facts as follows, for there was scarcely any dispute about them: Defendant had owned in common with one Weller a considerably larger tract, which included, as afterwards appeared, the tract in question. Defendant owned in severalty land immediately below. Above the true line between the land defendant owned in common with Weller and that he owned in severalty there ran a “fence row” along which bushes and trees had grown up. Defendant supposed this “fence row” to be the true line between the two tracts, but in fact a part of the Weller tract (that part in question) lay below it. Defendant had been renting the land above the “fence row” to one Clough; that below to other tenants. In 1904 defendant sold his interest in the Weller tract to the Queen City Bank but continued, nevertheless, to hold and claim all the land below the “fence row.” The

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bank, knowing the land by its deed only, continued to rent to Clough. In 1907 plaintiff took a lease from the bank but the writing had been lost and it did not appear how this leasehold was described in the lease. Plaintiff testified that the land in dispute was a part of the farm he rented from the bank; but on cross-examination he said that the rent contract specified "just only that he leased the bank property." The bank's agent testified that plaintiff was to get all the land the bank got from defendant. But he also said that he knew nothing about the disputed line, and that he was renting to plaintiff the same land he had rented to Clough. He said further, "I rented to him what I understood Clough rented," though he said nothing to plaintiff in reference to that. He also testified that his best recollection was that Clough rented the land the year before and showed plaintiff the lines of the land he was renting. This defendant did not deny. In the early part of the fourth year of plaintiff's tenancy question arose between defendant and the bank, or probably its successor in title, as to the location of the line between them, and a survey was had which developed the fact that the "fence row" was not the true line. Whereupon defendant surrendered the land in question to the bank's agent and "paid him the rent." For three years, at least, plaintiff appears to have accepted the land above the "fence row" as that to which he was entitled under his lease. During all this time defendant, by his tenants, was in possession and cultivating the land below the "fence row." It seems reasonably clear that plaintiff never at any time supposed he had less land than he was entitled to have under his lease until he became apprised of the controversy between the defendant and the bank, nor did the bank at any time before or since the settlement of this dispute with defendant give any

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recognition of plaintiff's claim to more. On these facts we think that plaintiff, so far from being entitled *ex equo et bono* or otherwise to the rents collected by defendant, got all he bargained for, and that the judgment ought to be affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

Jeffreys v. Jeffreys.

Ejectment.

(Decided June 12, 1913. 62 South. 797.)

1. *Ejectment; Pleadings; Admissions.*—Where defendant entered a plea of not guilty, thereby admitting his possession of the land described in the complaint as a strip off of the west side of a certain governmental subdivision of a section, and plaintiff showed title to all of such subdivision, plaintiff was entitled to the general charge, although defendant introduced in evidence a deed to the adjacent subdivision and showed possession for seventeen years of the strip in dispute, since defendant could not claim any land but that embraced in his deed without showing compliance with sec. 2830, Code 1907.

2. *Same; Title of Plaintiff; Evidence.*—In an ejectment action it was not error to permit plaintiff to introduce the deeds in his chain of title and follow it with evidence that the grantors therein were in possession when the deeds were executed.

3. *Boundaries; Pleading; Issues.*—Where the issues involved the proper location of the boundary line between a subdivision owned by plaintiff and the adjacent subdivision owned by defendant, defendant should disclaim and suggest a disputed boundary line under the provisions of section 3843, Code 1907.

4. *Appeal and Error; Harmless Error; Instructions.*—Where on the whole case plaintiff was entitled to the affirmative charge, any errors in instructions given or refused were harmless.

APPEAL from Lawrence Circuit Court.

Heard before Hon. D. W. SPEAKE

[Jeffreys v. Jeffreys.]

Assumpsit by J. M. Jeffreys against Thomas J. Jeffreys. Judgment for plaintiff and defendant appeals. Affirmed.

JAMES JACKSON, and G. O. CHENAULT, for appellant Defendant was entitled to show that he claimed the land as his own twenty years ago.—*Henry v. Brown*, 143 Ala. 446; *Lawrence v. Ala. S. L. Co.*, 144 Ala. 524. The court was either in error in refusing to permit defendant to show that his brother recognized the line as the owner of the land, or in permitting plaintiff to show that his father recognized the line when he was the owner of the land.—*Hoffman v. White*, 90 Ala. 352; *Beasley v. Clark*, 102 Ala. 258; *Davis v. Caldwell*, 107 Ala. 526. Counsel discuss the other assignments relative to evidence in the light of the above authorities, with the insistence that error intervened, and also discussed the charges refused, citing authorities in support of same. Because of adverse holdings they insist that the deeds in the chain of title of plaintiffs were improperly admitted and that defendant was entitled to the affirmative charge.—*Curtis v. Riddle*, 59 South. 47.

D. C. ALMON, for appellee. Under the pleadings and proof plaintiff was entitled to the affirmative charge.—Secs. 2830, 3843, Code 1907.

ANDERSON, J.—This suit was for 34 feet of land off the west side of the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 2. The defendant pleaded not guilty, which was an admission that he was in possession of the land described in the complaint; that is, "34 feet off of the west side of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2." The plaintiff showed title to all of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and was entitled to the general charge for the land sued for,

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which was a part of his said 80. The defendant introduced a deed to an adjoining 80, to wit, the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2; and the main controversy in the case was whether the strip was a part of the plaintiff's 80 or the defendant's 80, but the defendant's plea admitted possession of 34 feet on the west side of plaintiff's 80. There was evidence showing several surveys and that the exact boundary was uncertain, and that the defendant had been in possession for 17 years of the strip in dispute, but he could only claim adversely as to the land embraced in his deed, as he had no color of title or bona fide claim of purchase to any of the land in the plaintiff's 80, and could not claim any of it adversely without having complied with the statute as to filing a declaration in the probate office under the act of 1893, now appearing, though somewhat changed, as section 2830 of the Code of 1907.

If the strip in dispute was not a part of the plaintiff's 80, but was a part of the defendant's land, and as the real question in dispute was the proper location of the true line between them, the defendant should have disclaimed and suggested a dispute as to the boundary as provided by section 3843 of the Code of 1907. Having failed to do this and by his plea of not guilty admitted possession of land to which the plaintiff showed title, the plaintiff was entitled to the general charge, and, as this was true, any errors that the trial court may have committed, in giving or refusing charges, was without injury.

There was clearly no error in permitting the plaintiff to introduce the deeds from Deering to his father and from his father to himself, as proof was subsequently made that said grantors were in possession when the deeds were executed. The other rulings upon the evidence, whether erroneous or not, could not have

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changed the result so as to preclude the plaintiff from his right to the general charge.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Ashford v. McKee.

Ejectment.

(Decided February 13, 1913. Rehearing denied June 30, 1913.
62 South. 879.)

1. *Ejectment; Directing; Verdict.*—Where there was conflicting evidence tending to support the theory of both parties as to a contested boundary line, neither party was entitled to have the verdict directed.

2. *Same; Possession; Title.*—Although possession is *prima facie* evidence of title, and sufficient to support a recovery in ejectment, yet when it is shown that the true title is in another, the intendment in favor of the possession ceases.

3. *Same; Evidence.*—The answer of a witness that he knew nothing about the occupancy of certain lands prior to the making of a survey except that the land was recognized as the land of plaintiff, and that he exercised ownership thereof, was objectionable as involving a conclusion of the witness.

4. *Same; General Reputation.*—Where the character of possession of land is in issue, it cannot be proven by general reputation, nor by the opinion of witnesses as to the actual condition of the property.

5. *Same; Exclusive Possession.*—The question as to whether plaintiff was in exclusive possession of the land down to a specified line was objectionable as calling for a conclusion; although possession is a fact to which a witness may testify he may not testify that a person is in open and notorious possession.

6. *Same.*—A question whether the predecessor in title of plaintiff was in exclusive control of the land also called for a conclusion.

7. *Same; Opinion.*—In ejectment, a question whether a certain party was in control of the land at a specified time, was proper.

8. *Same.*—Where the action was over a disputed boundary line, and there was considerable testimony concerning an upper and a lower line, defendant contending that the upper or north line, as shown by the maps in the record, was the true line dividing the north

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and south half of the section, and plaintiff contending that the north-west quarter extended to the lower or south line, it was proper for a witness who was not a surveyor, but who had long acquaintance with the land, to testify whether he found surveyor's marks on trees all along the upper line through the section from east to west, as the evidence of ancient surveyor's marks along the line had a bearing on the question whether that was the true line.

9. *Same*.—Where the action was to determine a disputed boundary line between adjacent owners, it was competent to admit in evidence the deeds constituting defendant's chain of title, as well as certain mortgages executed by defendant's predecessors in title, as showing acts of ownership.

10. *Adverse Possession; Elements; Intent*.—Where a party occupies land to a fence because he believes the fence to be a division line, but without intent to claim beyond the fence if it should be beyond his line, his possession is not adverse, because of want of intent to claim land beyond the limits of his paper title.

11. *Same; Boundaries; Agreed Line*.—Where adjoining land owners agree on a dividing line, and each claims up to it as such, with knowledge of the claim by each other owner, the claim becomes hostile and adverse.

12. *Appeal and Error; Harmless Error; Evidence*.—Where the court erred in sustaining objection to a question as to whether a certain person was in control of the land at a specified time, the error was rendered harmless where the court almost immediately permitted the witness to testify that such person was in control of the land, claiming to own it, and that no other person claimed to own the land up to the time of such person's death, which occurred a number of years before.

13. *Same*.—Where the witness without objection proceeded and was permitted to answer the question at length, no harm resulted from sustaining objection to the question.

14. *Same*.—Where a witness subsequently testified that he delivered a deed to plaintiff at a certain place, and that the only possession he delivered to plaintiff was in delivering to him the deed conveying the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the section in which the land was located, any error in sustaining an objection to a question to such witness whether he put plaintiff in possession of the land down to and including a certain line, was rendered harmless.

15. *Same; Review; Record; Matters Included*.—Although the bill of exceptions recites that the motion for new trial was submitted on May 13, 1910, the same being the day to which the April term of the court had been adjourned, the order on the motion for new trial was not reviewable where there was no entry in the record proper showing that the court was lawfully in session on that day. (Section 3238, 3248, Code 1907.)

16. *Trial; Reception of Evidence; Rebuttal*.—Where the plaintiff in his main case introduced considerable evidence as to certain stones which he alleged marked the true line, and defendant offered no evidence as to when or by whom the stones were located, a question in rebuttal to a witness whether he knew when the stones were located on that line, and by whom, was not proper.

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17. *Same; Submission of Cause; Remarks of Court; Coercion of Jury.*—The facts relative to the conduct of the court in the absence of plaintiff and his counsel considered and it is held that the court's communication to the jury was not improper, and did not amount to duress or coercion.

18. *New Trial; Motion; Continuance.*—Where a motion for new trial was not acted on at the term at which it was filed, an order of continuance is ordinarily necessary to keep the motion alive until another regular term, but this rule does not apply to adjourned terms.

19. *Courts; Terms; Adjourned Term.*—An adjourned term of the circuit court is to be deemed a part of the regular term, and every step may be taken thereat which might have been taken at the regular term.

APPEAL from Limestone Circuit Court.

Heard before Hon. Thomas W. WERT.

Ejectment by Thomas T. Ashford against Simp McKee. Judgment for defendant and plaintiff appeals. Affirmed.

ALLEN & BELL, and JAMES E. HORTON, for appellant. Where adjoining owners agree on a certain dividing line, one of them going into possession of the lands under the agreement, and remaining in possession up to such line uninterruptedly and exclusively, claiming to own them, for ten years, gets a title, which can be divested only by a conveyance, or by adverse possession by another for the statutory period. *Pittman v. Pittman*, 124 Ala. 306; *Brown v. Cockerell*, 33 Ala. 38; *Hess v. Rudder*, 117 Ala. 528; *Tenn Coal, I. & R. Co. v. Linn*, 123 Ala. 112; *Davis v. Caldwell*, 107 Ala. 529; *Alexander v. Wheeler*, 69 Ala. 332; 1 Am. & Eng. Encyclopedia of Law, (2nd Edition) p. 793. If two coterminous proprietors of land make a parol agreement to employ a surveyor to run the dividing line between them, which agreement is executed and possession held accordingly for the period prescribed by the statute of limitations, or even for a long time short of that period, the agreement is binding and conclusive on the parties

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and those claiming under them. *Brown v. Cockerel*, 33 Ala. 38. Adverse possession of land, for the length of time prescribed as a bar by the statute of limitations, "arms the adverse holder with all the powers of offense and defense which an unbroken chain of title confers," and enables him successfully to prosecute or defend an ejectment; and it is not necessary that such possession should be under color of title. *Barclay v. Smith*, 66 Ala. 230; *Ryan v. Kilpatrick*, 66 Ala. 332. Title by adverse possession is sufficient to support ejectment. 10 Am. & Eng. Encyc. Law (2nd Edition) p. 486; *Doe v. Eslava*, 11 Ala. 1028; *Barclay v. Smith*, 66 Ala. 230; *Murray v. Hogle*, 92 Ala. 559, 9 South. 386. A conveyance of land by one against whom the land conveyed was held adversely by claim of title is void. *Dexter v. Nelson*, 6 Ala. 68; *Bernstein v. Humes*, 60 Ala. 602; *Rivers v. Thompson*, 43 Ala. 641. Possession of land may be shown by acts of dominion suitable with the land in controversy. *Woods v. Montevallo Coal & T. Co.*, 84 Ala. 560; *Rivers v. Thompson*, 46 Ala. 335; *Childress v. Calloway*, 76 Ala. 134. Possession of land is a fact to which a witness may testify. *Eagle & Phoenix Mfg. Co. v. Gibson*, 62 Ala. 369; *Steed v. Knowles*, 97 Ala. 578; *Woodstock Iron Co. v. Roberts*, 87 Ala. 442; *Turnley v. Hanna*, 82 Ala. 139; *Elliott v. Stocks*, 67 Ala. 290; *Wright v. State*, 136 Ala. 139; *Driver v. King*, 145 Ala. 585. After the jury have retired, it is error to give them further instruction, in the absence of counsel, the court having made no effort to have them called. *Kuhl v. Long*, 102 Ala. 563; *Fiebelman v. Manchester*, 108 Ala. 203; *Morris v. State*, 146 Ala. 66; Brickwood's Sacket's Instruction to Jury, Sec. 93; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Decis. 694; *Sargeant v. Roberts*, 1 Pick. Mass. 337. 11 Am. Decis. 185; *Havenor v. State*, 125 Wis. 444, 4 Am. & Eng. An.

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Cases 1052; *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Repts. 480.

SANDERS & THACH, for appellee. "Without actual possession, there can be no adverse possession, but where there is actual possession of a part under color of title it is co-extensive with the boundaries defined by the color of title." *Anniston v. Edmondson*, 127 Ala. 464. "An intent accompanying the possession and claim of ownership in the property is an essential element of adverse possession." *Stiff v. Cobb*, 126 Ala. 381; *Alexander v. Wheeler*, 69 Ala. 332. "Possession may be adverse when it is such as the land reasonably admits of, and may be adverse without enclosure, cultivation, or residence, but in order for it to ripen into title, the possession must be by acts calculated to put the true owner on notice of the adverse holding so as to raise the presumption that he has acquiesced in the holding." *Bynum v. Hewlitt*, 137 Ala. 336; *Goodson v. Brothers*, 111 Ala. 589; *Lucy v. Tennessee Co.*, 92 Ala. 246; *Eureka Co. v. Norment, et al.*, 104 Ala. 625; *Washington v. Norwood*, 128 Ala. 390. "A mortgage by a defendant in possession, or a deed by a defendant in possession is admissible to show acts of ownership and to show the extent of the possession." *Stiff v. Cobb*, 126 Ala. 381; *Anniston City Land Co. v. Edmondson*, 127 Ala. 445. "The character of the possession of land by a party is not a question of fact to which a witness may testify, but is a question to be submitted to and determined by the jury from the evidence." *Benge v. Creaghs, Admr.*, 21 Ala. 151; *Driver v. King*. 145 Ala. 587. "The fact that one claiming land adversely did not return the land for taxation is a relevant circumstance tending to rebut his evidence that he claimed to own the land." *Wing v. Roswald*, 74

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Ala. 346; *Doe ex dem Anniston City Land Co. v. Edmondson*, 37 South. 424. "Occupancy up to a mistaken boundary line with no intention to claim beyond the true boundary line is not adverse beyond the true line. *Davis v. Caldwell*, 107 Ala. 526. "In case of unenclosed, unoccupied, wild timbered land, it is incompetent to ask a witness whether he was in possession of the land, the facts should be shown which in law constitute possession." *Thompson v. Burhans*, 61 New York Reports, 52. "The United States statutes make the field notes and plats of the original surveyor, the primary and controlling evidence of boundary." Teidl. on Real Property, Sec. 832; 24 Am. & English Encyc. of Law, 1002; *Taylor v. Fomby*, 22 South. 910-912. The court committed no error in overruling the motion for a new trial. *DeJarnett v. Cox*, 29 South. 618-619. "Instructions to the jury are defined as the exposition by the court of those principles of the law which the latter are bound to apply in order to render such a verdict as will in state of the facts proved, at the trial to exist, establish the rights of the parties to the suit. It is the direction of the court to the jury with reference to the law or facts of the case." 22 Cyc. p. 1375, and note; 16 Am. & Eng. Encyc. of Law, p. 824, and Notes; 11 Encyc. of Pl. and Pr., p. 56. "A direction to retire with their bailiff; to separate for their meals; to seal up their verdict; to abstain from talking among themselves or with others; to sign their general verdict, are not instructions within the meaning of the law." *McAlister v. Mount*, 73 Ind. 567; 16 Am. & Eng. Encyc. of Law, p. 824. "The trial judge is vested with large discretion in the conduct of judicial proceedings, and he may properly admonish the jury as to the desirability and importance of agreeing on a verdict, and may urge them to make every effort to do so consistent with their

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consciences." Encyc. of Pl. & Pr., Vol. 11, p. 304, and authorities cited. "The trial judge may advise the jury that this case had been troublesome and had cost much time and trouble to investigate it, and, therefore, there should be a verdict." *Allen v. Woodson*, 50 Ga., p. 63; 11 Encyc. of Pl. & Pr., p. 305.

DOWDELL, C. J.—1. This is an action of ejectment between coterminous proprietors, involving a strip of land containing about 26 acres. Ashford's muniments of title called for land in the northwest quarter of section 36, and McKee's muniments called for land in the southwest quarter, just south of Ashford. Ashford sought to show by his evidence that this 26-acre strip of uninclosed woodland lay north of the line which had been long recognized as the quarter section line by him and his predecessors in title and also by McKee's predecessors, and as being the true line between the two properties, and that he and his predecessors had been in possession down to this line, and had exercised ownership by cutting timber for boards, rails, etc., at various times, covering a period of many years, and that, even if this disputed tract lay south of the real quarter section line, he had title by adverse possession. McKee sought to establish that the disputed tract was on the south side of the true quarter section line, and really formed a part of the southwest quarter, which had been conveyed to him; that it had never formed a part of the northwest quarter, as shown by the government field notes; that the disputed tract was uninclosed woodland which had never had any timber cut off of it until done by the McLain Lumber Company, his grantee of timber rights, at a comparatively recent period. There was evidence tending to support both the theory of the plaintiff and that of the defendant. Under this state of

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the evidence, the refusal by the court below of the affirmative charge in favor of the plaintiff was without error. In this connection, in view of the insistence of counsel for appellant that the affirmative charge should have been given, it will be noted that Caldwell, a surveyor, and witness for plaintiff, admitted that: "According to the government survey and field notes, the land in controversy lies in the southwest quarter of section 36, and that Mr. Ashford's deeds call for land in the northwest quarter." To the same effect, another surveyor, Geo. Motz, a witness for plaintiff, testified. The plaintiff himself testified that he had been paying taxes on the northwest quarter, and stated: "I have not intended to claim in section 36 any land for which I have no conveyance." The jury might well have inferred from this evidence that the disputed tract was south of the true quarter section line, and that, although plaintiff might have exercised acts of ownership over it, he did not intend to claim it if it was in fact not within the description of his conveyances. It is true plaintiff added that: "I have always considered that I bought, and have always claimed to the old line and to the true line. I bought my land down to the original line, and it was my intention to pay taxes down to there."

The rule in this state, early laid down in *Brown v. Cockerell*, 33 Ala. 38, was expressed in that case as follows: "If a party occupies land up to a certain fence, because he believes it to be the line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting. The intent to claim does not exist, and the claim which is set up is upon the condition that the fence is upon the line." See, also, *Humes v. Bernstein*, 72 Ala. 556; *Alexander v. Wheeler*, 69 Ala. 332; *Hess*

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v. Rudder, 117 Ala. 525, 23 South. 136, 67 Am. St. Rep. 182; *Holt v. Adams*, 121 Ala. 668, 25 South. 716; *Walker v. Wyman*, 157 Ala. 482, 47 South. 1011. All of these cases recognize the doctrine that when parties agree upon a line as a dividing line, and each claims up to it as such, with knowledge of such claim by the other coterminous owner, the claim becomes hostile. But, as was remarked in the case first above cited, although "possession is prima facie evidence of title, and a recovery in ejectment may be had upon it," yet, "when it is shown that the true title is in another, the intentment in favor of the possession ceases. The law, then, will not presume that the possessor does the wrong of disseising the true owner. It devolves upon him the burden of showing the hostility of his possession to the true owner."

One John Morgan, a witness for the defendant, testified that the McLain Lumber Company, to whom McKee sold the right, did the first cutting on the disputed tract; that he saw the negroes cut the board timber testified about, and that it was not on the disputed tract, but north of it. This piece of testimony alone, if believed by the jury, afforded some ground of possible inference that the witnesses for plaintiff might have been mistaken as to the cutting of timber on this strip of land. We might call attention to other parts of the quite voluminous testimony showing a conflict in the evidence on material issues in the case, but suffice it to say that a careful perusal of the record convinces us that the trial court should not be put in error for refusing the affirmative charge. Without intending to intimate, by what has been said in support of the court's ruling, any opinion as to the correctness of their verdict, we think the case was properly submitted to the jury.

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2. The first assignment of error goes to the exclusion by the court on defendant's motion of the answer of the witness Motz to the question: "Do you know anything about the occupancy of this land previous to the time of making the survey?" The answer, which was excluded, was: "Nothing except this is recognized as his (Ashford's) land, and he exercised ownership over it." The answer was not responsive to the question, and was otherwise objectionable as involving a conclusion of the witness. Furthermore, this witness was a surveyor from another county, and there is nothing in the evidence to show any opportunity on his part for knowledge of the previous exercise of ownership, leaving his answer as the bald expression of opinion.

It has been held by this court that where the character of possession is in issue, it cannot be proved by general reputation, nor by the opinion of witnesses as to the actual condition of the property. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

3. The second assignment of error is based on the court's sustaining the objection of the defendant to the question to the witness High, "Was she in the exclusive possession of the land down to the lower line?" This ruling was free from error. As was said in the case of *Driver v. King*, 145 Ala. 595, 40 South. 319: "It is true that possession is a fact to which a witness may testify. *Eagle & Phoenix Co. v. Gibson*, 62 Ala. 369; *Steed v. Knowles*, 97 Ala. 579 [12 South. 75]. But we have never held that a witness may testify that a person was in the open and notorious possession of land. The character of possession was a fact to be determined by the jury from the evidence, and, to aid them in reaching a conclusion as to openness and notoriety of possession, it was competent for witness, who had testified to the fact of possession, to state how the defend-

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ants used the land—what acts of ownership they exercised over them—and whether frequent or otherwise. But it is clear that for a witness to testify that a person was in the open and notorious possession would be but the echo of the opinion of the witness, and a usurpation of the functions of the jury (citing *Benje v. Creagh's Adm'r, supra.*) It is plain that this principle would render this question as to “exclusive possession” objectionable.

The sixth assignment is based upon sustaining defendant's objection to a similar question propounded to the plaintiff as to whether he had been in “exclusive possession” of the land since he purchased it from his mother, and the objection was properly sustained.

The fourth assignment of error relates to the sustaining of an objection to a question as to whether plaintiff's predecessor was in “exclusive control” of the land, and for like reasons this question also was improper. Control, like possession, is a statement of collective fact, which is permissible, but when qualified by such terms as “open and notorious,” “exclusive,” etc., the realm of mere opinion is entered, and the function of the jury usurped. *Woodstock Iron Co. v. Roberts*, 87 Ala. 441, 442, 6 South. 349.

4. The third assignment involves the question to the witness High, “Was she (Mrs. Ashford) in control of that land at that time?” This was a proper question, but the error in sustaining the objection thereto was cured by the court's almost immediately permitting the witness to testify, as shown by the record, “that Mrs. Ashford was in control of this land, claiming to own it; that no one else beside her claimed to own the land; that Mrs. Ashford was in possession of the land up to the time of her death, which occurred quite a number

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of years ago." It satisfactorily appears that the plaintiff suffered no injury by this action of the court.

The same thing appears with regard to the question to the witness Johnson (fifth assignment), to which objection was sustained, which reads: "State to the jury whether or not, during the time you have known this land, who had had it in possession during the last 15 or 20 years." While the phraseology of this question is a little involved, its meaning is clear, and it constitutes a legal question. While the court sustained an objection thereto, the witness at once proceeded, and was permitted, to answer the question, at some length, as will appear by reading pages 30 and 31 of the transcript. We will not unduly lengthen this opinion by quoting this testimony. The record speaks for itself. It readily appears therefrom that the appellant was not injured by this ruling of the court.

The seventh assignment of error is without merit, and is not insisted upon in argument.

The eighth assignment of error sets up the refusal of the court to permit plaintiff to ask witness High the question: "State whether or not under this deed you put Mr. Ashford in possession, you and your sons, of the land down to the lower line as shown on the map." If this question be objectionable, all injury to the plaintiff was eliminated by the further testimony of this witness, which (see page 42 of record) was: "Witness High further testified that when he sold Ashford the west half of the northwest quarter of section 36, he made him the deed at Madison Station, and delivered it to him there, and was not on the premises at the time, and had not been since, and that the only possession he delivered to Ashford was in delivering to him the deed conveying the west half of the northwest quarter of said section."

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5. Assignment of error 21. After the defendant had closed his case, the plaintiff recalled witness High, and asked him "whether or not he knew when those stones were located on the line and by whom." To this question the defendant objected upon the ground that same was not in rebuttal, which objection was sustained. In making out his case on the direct, the plaintiff had offered a great deal of evidence about these stones on what he claimed to be the true line. He made it a part of his main case. The defendant had not offered any evidence showing when the stones were located on that line nor by whom. Hence the question called for matter which was not strictly in rebuttal. This same witness testified that when he was living on the land between 1869 and 1874 he had a survey made, running the line from the stone on the west to the stone half-way of the center of the section, considering that the true line; that he notified the Blackwells of the survey; that they were not present thereat, but told him that the corners were marked by a stone; and that he would have no trouble in finding them. There was other evidence offered tending to show that these stones had been there for a very long period of time. Willis Tate said he had been knowing the lands for 50 years, and the rocks were there to mark the corners, and that his father, who had died at the age of over 100 years, told him that he carried the chain for the original survey, and that these rocks were on the line of that survey. He also testified to placing two rocks on that line when he was carrying the chain in the survey made by Mr. High 39 or 40 years ago. In view of Mr. High's testimony early in the case that the Blackwells (who at that time owned the southwest quarter) told him he would find those rocks marking the corners, when he was surveying the land some 40 years ago, and that he

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did so find them, and surveyed according thereto, manifestly he had already answered the question, propounded on rebuttal, to the best of his own knowledge. It would require a very strained construction to put the trial court in error for sustaining the objection to this question. While the court might without error have permitted it, yet, not being strictly in rebuttal of any affirmative fact which the defendant had endeavored to prove, and the plaintiff having rested his main case, it was within the discretion of the trial court, enforcing those rules which are designed for the presentation of cases in due order, and bringing them to an end at some reasonable period, to refuse to reopen a part of the plaintiff's main case, by sustaining the objection, as here made, and without error.

6. The record is full of testimony about an upper and lower line, the defendant contending that the north or top line as shown by the maps in the record was the true line dividing the north from the south half of the section, and the plaintiff contending that the north-west quarter extended to the lower line. Thus it became entirely relevant for witness John Morgan, who had testified to a long acquaintance with the property, as to whether or not he found surveyor's marks on trees along the upper line all the way through the section from east to west. If there were ancient surveyor's marks along this line, it had a bearing on the question as to whether or not that was the correct line. There was no error in overruling appellant's objection to the question to witness Morgan set forth in the twentieth assignment of error. The fact that the witness had not qualified as a surveyor, while it might have affected the weight of his evidence, did not render him incompetent to testify that he found surveyor's marks.

7. Assignment of error numbered from 9 to 19, inclusive, based upon the court's allowing to be intro-

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duced in evidence the deeds constituting the chain of title under which the defendant claimed to own the land, and certain mortgages executed by defendant's predecessors in title, are not insisted upon in argument by counsel for appellant. The mortgages were evidently introduced as tending to show acts of ownership. *Stiff v. Cobb*, 126 Ala. 381, 28 South. 402, 85 Am. St. Rep. 38.

The twenty-second assignment is based on the refusal of the affirmative charge, and has already been considered.

8. The only other assignments of error insisted upon in argument are the twenty-third to twenty-seventh inclusive, based upon the overruling by the court of appellant's motion for a new trial. The case was tried in April, 1910, at the regular term of the Limestone circuit court, which, according to the statute (section 3238, Code 1907) in effect at that time, met on the first Monday after the fourth Monday in March, and might continue in session for two weeks. The judgment overruling the motion for a new trial was made on May 13, 1910 (see page 103 of record). The record proper does not show any order for an adjourned term, or special term, signed by the judge and entered on the minutes of the court, as provided by section 3249 of the Code of 1907, for or including the date of May 13, 1910, when the judgment overruling the motion was entered. The bill of exceptions, on page 92 of this record, does recite that the motion was submitted to the court for decision on May 13, 1910, "the same being the day to which the April term of court had been adjourned," but there is nothing in the record proper, nor for that matter in the bill of exceptions, showing that an order was made, signed, and entered on the minutes of the court in such a manner as the law requires. Without

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this, there could have been no legal term of the court on the day the judgment on the motion was entered, and it does not therefore appear to this court that the Limestone county circuit court was legally held at that time. Furthermore, the record before us does not show any continuance of this motion to that date. The record shows that the original motion was filed April 13, 1910, and the amendment thereto was filed May 12, 1910. Ordinarily an order of continuance is necessary to keep a motion for a new trial, not acted on at the term when made, alive until another term. *So. Rwy. Co. v. Jones*, 143 Ala. 328, 39 South. 118. But this rule might not apply to an adjourned term. It has been said that "a court held by adjournment is not a new term, but a continuance of the former term." *Com. v. Justices*, 5 Mass. 435; *People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039. It has further been held that an adjourned term is to be deemed a part of the regular term; and every step may be taken at it, which might have been taken at the regular term. *Smith v. Smith*, 17 Ind. 75. But the record not showing the order for an adjourned term, required by law, it does not appear to this court that the circuit court of Limestone county was legally in session on May 13, 1910, and the judgment rendered on that day upon that motion is not properly before us for review.

9. Even if it were, we would be inclined to hold that the motion was properly overruled. The only matter urged in support of the motion for a new trial and insisted upon in argument here, which has not already been considered above, is certain alleged instructions or communications given by the presiding judge to the jury in the absence of appellant and his counsel. The remarks of the judge to the jury, made in open court, although in the absence of plaintiff and his counsel,

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were manifestly not instructions upon any of the issues in the case, nor did the language used amount to coercion.

The proof offered in support of the motion shows that the case was submitted to the jury at 7 p. m. on Wednesday, that it was agreed by both sides that the clerk might receive the verdict, and that if necessary it might be put in proper form. The presiding judge was called to Decatur and left on the 7:52 train, returning to Athens between 12 and 1 o'clock the same night. He went to the courtroom, and finding that the jury was still in their room, had them called out, and asked them if they had agreed on their verdict, and, being advised that they had not, he told them to return to their room and further consider their verdict. Upon leaving the courtroom the judge instructed the bailiff that, if the jury had not agreed on a verdict by 4 a. m. to notify them that they might disperse and return to the courtroom at 9 a. m. On the following morning, after convening court, another case was called in which a struck jury was demanded, and the judge ordered that the jury in the Ashford McKee Case be brought into the courtroom. When they appeared, the court asked them if they had been able to agree upon a verdict, to which they replied that they had not. The court thereupon stated that he did not mean to intimate that they should return a verdict for one side or the other, or that they should return any verdict at all, but that if they could reach a conclusion without any sacrifice of principle or conviction, he would be glad for them to do so; that the case had consumed a great deal of time and expense in its trial, and that if it was possible for them to reach a unanimous conclusion one way or the other, he would be glad, but that he expressly refrained from indicating or intimating what verdict they should

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return, or that they should return any verdict at all in the case, and stated to them that his purpose in calling them before the court at this time was to ascertain whether they were qualified to serve on the next case called for trial. The court had observed counsel on both sides in the courtroom shortly before the jury appeared, but plaintiff and his counsel were not present when the above statement was made to the jury, nor was defendant present. Defendant's counsel was in the room, but had nothing to say, nor did the court consult with counsel about calling the jury into the courtroom. The court made no effort to have counsel for plaintiff brought in so as to be present when the statement was made to the jury above quoted, and said counsel knew nothing about it. About an hour after the jury had again retired, they returned the verdict in favor of the defendant.

We can see nothing here that required the presence of counsel, nor does any attempt to coerce the jury appear. It is the duty of trial judges to expedite the trial of causes when it can be done in a manner entirely consistent with fairness and justice. The sum and substance of what the court said to this jury—in a most tactful way—was but a gentle hint that their services were needed in other cases, and not to waste time unnecessarily, but to reach a unanimous conclusion as soon as they properly could, if they could do so without any sacrifice of principle or conviction. Such remarks were held not to constitute instructions, in the sense that requires counsel to be present when the court charges or instructs the jury. See case of *De Jarnette v. Cox*, 128 Ala. 522, 29 South. 618; also 16 Am. & Eng. Encyc. Law, p. 824, and notes. Nor do we see anything improper or coercive in these remarks. Of course there should be nothing in the intercourse of the court with

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the jury having the least appearance of duress or coercion. Any attempt to influence the jury by referring to the length of time which the court proposes to keep them together, or the inconvenience to which they may be subjected in case they should be so pertinacious as to adhere to their individual opinions, and thus disagree, cannot be justified. *Phoenix Ins. Co. v. Moog*, 81 Ala. 343, 1 South. 108; *De Jarnette v. Cox*, *supra*. On the other hand, as well expressed in 11 Encyc. of Pl. & Pr. p. 304: "The trial judge is vested with large discretion in the conduct of judicial proceedings, and he may properly admonish the jury as to the desirability and importance of agreeing on a verdict, and may urge them to make every effort to do so consistent with their consciences. He may advise jurors to lay aside mere pride of judgment, and not to adhere to an opinion regardless of what the other jurors may say, merely through stubbornness, to examine any existing difference in a spirit of fairness and candor, and to reason together and talk over such differences and harmonize them, if possible. So, also, the court may urge as reasons for agreeing on a verdict the time and expense which a new trial would entail. But it is not proper to give an instruction censuring jurors for not agreeing with the majority.'

The case of *Fiebelman v. Manchester*, 108 Ala. 180, 19 South. 540, cited by appellant, is not in conflict with our view of the instant case. There the court gave the jury additional instructions as to the law of the case in the absence of counsel.

No reversible error appearing in the record, the judgment of the lower court will be affirmed.

Affirmed.

ANDERSON, MAYFIELD, and DE GRAFFENRIED, JJ., concur.

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Higgin, et al. v. Tennessee Coal, Iron & R. R. Company.

Ejectment.

(Decided May 15, 1913. 62 South. 774.)

Wills; Description; Identification; Evidence.—Where the will through which both parties claim title, described the land by government subdivision but omitted to give the section number, it was competent to show by parol testimony that the testator owned lands in a certain section corresponding to that described in the will, and owned no other land to which the description in the will could be applied; such a case falls within the intermediate class between strictly patent and latent ambiguities in description, and in such class of cases parol evidence is admissible.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Ejectment by James Higgins and others, against the Tennessee Coal, Iron & Railroad Company. Judgment for defendants and plaintiffs appeal. Affirmed.

JOHN D. STRANGE, and J. B. AIRD, for appellant. No brief reached the Reporter.

PERCY, BENNERS & BURR, for appellee. No brief reached the Reporter.

MAYFIELD, J.—This is an action of ejectment, brought by appellants against appellee, to recover an undivided one-fifth interest in the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 8, township 17 south, range 4 west, situated in Jefferson county, Ala.

The parties claim through a common source of title, Thomas Higgins. The plaintiffs claim as heirs at law, being grandchildren of said Higgins, while the defendant claims through will of said Thomas Higgins to his

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daughter, Elizabeth Adeline Shoemaker, and by a chain of conveyances from her on down to defendant. The lands in dispute were not fully described in the will. In fact, if the description in the will stood alone and was unaided by parol proof, it might be void for uncertainty. The lands are described as "the south half of the southwest quarter of section of township 17, range 4, west, in Montgomery Land Office District, containing 79 and 97/100 acres." Standing alone, this description would apply equally to the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of *any one* of the 36 sections in township 17, range 4. The defect was attempted to be cured by proof that the testator owned, and had entered from the government of the United States, lands corresponding to this description in every respect but made certain by being located in section 8 of the township and range named, and by proof that the testator owned no other lands corresponding to such description, or to which the description given in the will could be applied. If this proof was made, then it seems to us that the description was rendered certain, notwithstanding the written description, standing alone, was uncertain.

The case at bar we think is very much like that of *Chambers v. Ringstaff*, 69 Ala. 140. The contention of the appellant in that case was identical with that of appellant in this case. There, in the description of the land, the section was given but no reference was made to either state, county, or basis meridian, while in this case the land is described as being in the Montgomery Land Office District. Parol proof was allowed in that case to make the description certain; and the fact was shown that the grantor or mortgagor owned the land in question whereas the proof failed to show that she owned any other which would correspond to the description. As was pointed out by Judge Stone in the

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Ringstaff Case, if the uncertainty of description is a patent ambiguity (that is, one apparent in that it described two or more things or persons), then parol evidence is not admissible to remove the ambiguity; but, if the ambiguity is latent (that is, if the description on its face is certain but is rendered uncertain by proof aliunde), then parol proof is admissible to make the description certain or to remove the ambiguity caused by parol evidence or extrinsic facts. He there shows, however, that there is an intermediate class of cases which partake of the nature of both latent and patent ambiguity (that in other words are from their nature hybrids) and hence are not to be governed strictly by the rules applicable to either latent or patent ambiguity. After defining and stating very clearly the rules as to the two classes, latent and patent, he adds: "There are cases involving principles which are scarcely referable to either of these heads. They may be styled exceptional shadings of patent ambiguity. They arise when on mere inspection there does appear to be an uncertainty or ambiguity. This frequently grows out of a careless use of language and sometimes results from the many shades of meaning usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which Mr. Justice Story has characterized as an intermediate class of cases, partaking of the nature both of latent and patent ambiguity. That learned jurist in *Peisch v. Rickson*, 1 Mason, 9 Fed. Cas. No. 10,911, says: 'In such a case I should think parol evidence might be admitted to show the circumstances under which the contract was made and the subject-matter to which the parties referred.'" The result of the reasoning in that case was that the court necessarily held that the case in hand was one belonging to the

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intermediate class. The holding in that case was what is in this case and was thus expressed by Judge Stone: "We hold, then, that when it was admitted or found by the jury that Mrs. Knight owned the lands sued for when the mortgage was made, in the absence of other proof that she or her husband owned or claimed other lands falling within the description, it then became the duty of the court to pronounce the mortgage a valid conveyance."

The undisputed evidence was that the testator owned the land in question; in fact, both parties claim through him; and the proof utterly failed to show that he owned any other that would correspond to the description. It therefore follows that the general affirmative charge was properly given for the defendant.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Ejectment.

(Decided May 22, 1913. 62 South. 811.)

Adverse Possession; Claim or Declaration; Conveyance.—Where a person deeded certain land, which was his home place, to M., who either never took possession of the land, or abandoned it shortly thereafter, returning the deed to his grantor, telling him he did not wish the land, and the grantor remained in possession until he conveyed the land to K. in 1906, the original owner's possession was adverse, co-extensive with the boundaries of his original title, and it was not necessary that he should file a claim or declaration under Acts 1893, page 478, in order to claim adversely, as he was claiming under such original title, and under a surrender or gift to him by his grantee of so much of the land as he had previously conveyed to such grantee.

APPEAL from Lauderdale Circuit Court.

Heard before Hon. C. P. ALMON.

[Kretzer v. Jackson.]

Ejectment by Frank Jackson against Anna Kretzer. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Plaintiff traces title through deed from William Peck to Herman Muller, mortgage from Muller to Frank Jackson, and deed from Jackson as mortgagee to himself as purchaser at the mortgage sale. Defendant claims by deed from William Peck to herself and an adverse holding under the facts as stated in the opinion.

PAUL HODGES, for appellant. The provisions of section 1541, Code 1896, are without application here as the holding was by one having title or at least under claim of right by gift or otherwise.—*Owen v. Moen*, 52 South. 529; 48 South. 1033; 37 South. 98; 25 South. 716. Under the evidence the holding was adverse, and the court was in error in holding otherwise.—*Hess v. Ruddler*, 23 South. 136; 1 Cyc. 900; 19 S. W. 61; Authorities supra. Muller delivered the land as a gift together with the deed to him, and at once the possession of his grantor became adverse.—*Lee v. Thompson*, 99 Ala. 95, and cases there cited.

ASHCRAFT & BRADSHAW, for appellee. Section 1541, Code 1896, became operative on February 11, 1893, and the evidence discloses that Peck went into possession of the title after that time. Hence, his holdings to become adverse must have been under a declaration or claim filed under said section. While a gift of land and possessions may be color of title as between vendor and vendee, it cannot be held to be color of title as between strangers to the transaction.—*T. C. & I. v. Lynn*, 123 Ala. 112; *Burkes v. Mitchell*, 78 Ala. 61; *Clements v. Hayes*, 76 Ala. 280; *Bell v. Denison*, 56 Ala. 444; *Matthews v. T. C. & I.*, 157 Ala. 23.

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Peck was a squatter and in order for his possession to ripen into title, it was necessary for him to give the notice prescribed by the statute.—*Scales v. Ott*, 127 Ala. 582; 28 A. & E. Enc. of Law, 154.

ANDERSON, J.—While there was evidence that Peck deeded the land in question to Muller, and which was a part of his home place, there was further proof that Muller never took possession of the land, or abandoned it shortly thereafter if he did, and returned the deed to Peck and told him he did not wish the land. Peck has ever since remained in possession of same until he conveyed it to this defendant in 1906. If these facts were true, Peck's possession was adverse, and the boundaries thereof were coextensive with his original title, which was admitted to be in him prior to the Muller deed, and he did not have to show a pedis possessio as to all of the land.—*Hickman v. Link*, 97 Mo. 482, 10 S. W. 600; *Hughes v. Israel*, 73 Mo. 538. Nor did Peck have to file a claim or declaration, under the act of 1893, p. 478, in order to claim adversely, as he was claiming under his original title and a surrender or gift to him by Muller of so much of the land as he had previously conveyed to him.—*Owen v. Moron*, 167 Ala. 615, 52 South. 527; *Holt v. Adams*, 121 Ala. 664, 25 South. 716; *Sledge v. Singley*, 139 Ala. 346, 37 South. 98. The statute as it previously existed was changed by the Code of 1907, § 2830, but the possession in this case is controlled by the old statute.

The trial court erred in holding that the defendant was not entitled to rely upon the adverse possession of herself and father in order to defeat the plaintiff's title as acquired by the mortgage from Muller, and the judgment of the circuit court is reversed, and the cause is remanded.

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Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

Bell, et al. v. Bell, et al.

Administration and Distribution.

(Decided May 15, 1913. Rehearing denied June 30, 1913.
62 South. 833.)

1. *Appeal and Error; Review; Finding.*—Where a contest of fact which is properly triable before a jury is submitted by consent for decision by the court the appellate courts will treat the judge's findings of fact as a verdict of the jury.

2. *Same.*—The finding of a trial judge as to facts, where the case is tried on written testimony will not be reversed on appeal unless there is a decided preponderance against the conclusion arrived at.

3. *Same; Oral Evidence.*—Where disputed questions of fact are tried before and decided by the trial court sitting as judge and jury, on testimony ore tenus, his finding will not be disturbed on appeal, unless it is so manifestly against the evidence that a trial judge would set aside a similar verdict rendered on the same testimony.

4. *Same; Appeal to Intermediate Court; Disposition of Cause.*—Where the issue was the validity of a marriage between a freed man and a freed woman, and the probate court correctly held on the evidence before it that there was a valid marriage, but should have granted a new trial on motion therefor supported by affidavit submitted as to newly discovered evidence the circuit court, on the appeal from the probate court, should have reversed and remanded the cause to the probate court for a new trial, and it was error for that court to reverse the probate court and render judgment in favor of the opposite party.

(Sayre and deGraffenried, JJ., dissent.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. JOHN C. PUGH.

Proceeding for the determination of distributees of the estate of Jim Bell, deceased. Property having been awarded to George Bell and others, and a motion for new trial by Mary Bell and others having been de-

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nied, they appealed to the circuit court, where the judgment was rendered for Mary Bell and others, from which George Bell and others appeal. Reversed and remanded, with instructions.

DAVID S. ANDERSON, for appellant. The circuit court acted in the capacity of the appellate court, and not as a trial court under section 2855, Code 1907, and hence, the wrong verdict was rendered. Prior to the Acts of 1911, amending section 2846, the action of the probate court on motions for new trial was not revisable.—*Nooes v. Garner*, 70 Ala. 443. Prior to the acts of February 16, 1891, the same rule was applicable to city and circuit court.—*Cobb v. Malone*, 92 Ala. 630. But under section 2846, and 2855, Code 1907, the trial is not de novo on an appeal such as this, and brings up for review only the orders appealed from, and not the correction of errors in the main trial.—*Carter v. Peck*, 121 Ala. 638; *Lee v. DeBardelaben*, 102 Ala. 628. "Newly discovered evidence is no ground for a new trial, unless it appears that the requisite diligence was used to discover the evidence *before the trial*.—*Jernigan v. Clark*, 134 Ala. 316; *McLeod v. Shelby & Co.*, 108 Ala. 81; *L. & N. v. Church*, 155 Ala. 329; *Ala. Midland Ry. v. Johnson*, 123 Ala. 197; *Woodward Co. v. Sheehan*, 166 Ala. 429; *Sou. Hardware Co. v. Black*, 163 Ala. 81. "On a motion for a new trial for newly discovered evidence, the materiality must not only be shown, but it must also appear that the failure to produce it *at the trial* was due to no lack of diligence on the part of the applicant."—*Garidona v. Ry.*, 60 South. 871. "Finding in determining a motion for a new trial for newly discovered evidence are presumptively correct, and the burden is on the appellant to show error."—*Garidona v. B'ham Sou. Ry.*, 60 South. 871. This being true the

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affidavits do not over-come this presumption. "Where newly discovered evidence consists wholly of admissions by plaintiff to third person an order denying a new trial will be sustained.—*Jones v. Tucker*, 132 Ala. 305. "The law exacts diligence from suitors, and, if necessary parties must, in the preparation of their cases, control and overcome difficulties."—*Frank v. Fabian*, 160 Ala. 210; *Allington v. Tucker*, 38 Ala. 655. "Contradictory or impeaching evidence will not warrant a new trial."—*Jones v. Tucker*, 132 Ala. 305. "Before a trial will be awarded for newly discovered evidence there must be a clear showing that by reasonable diligence it could not have been procured *before the trial*."—*Smith v. B. R. L. & P. Co.*, 147 Ala. 702.

BONDURANT & SMITH, for appellee. On the question of when a new trial will be granted on newly discovered evidence, counsel cite *Cox v. Mobile Ry. Co.*, 44 Ala. 615; *W. Va. L. Co. v. May*, 166 Ala. 127; *White v. Blair*, 95 Ala. 148; *Cox v. B'ham Ry. Co.*, 50 South. 975, and cases cited under section 2846, Code 1907. The evidence that Jim Bell recognized George Bell as his son, could not be considered.—*Moore v. Heineke*, 119 Ala. 636; 6 Enc. of Evid. 476; 6 Mayf. 579. The presumption of an actual marriage from the fact of cohabitation is rebutted by the fact of a subsequent permanent separation and marriage of the parties.—*Weatherford v. Weatherford*, 20 Ala. 548, and authorities supra.

MAYFIELD, J.—The sole bone of contention in this case is, Who are the distributees of the estate of one Jim Bell, deceased, on account of whose wrongful death his administrator had received \$1,000 for distribution as provided by the statute? The question was properly raised in the probate court, the evidence was there

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heard ore tenus, and the probate judge decided the question in favor of appellants. An application for new trial was made in the probate court by appellees, and a great number of affidavits, in support of and in opposition to the motion, were introduced in evidence. The motion was denied by the probate court, and appellees (here) appealed to the circuit court, as is authorized by section 2855 of the Code. The trial was had in the circuit court on a transcript of the proceedings in the probate court, and the circuit judge, as an appellate court, by virtue of section 2865 of the Code, reversed the judgment of the probate court, and rendered judgment for appellants there (appellees here); and from that judgment this appeal is prosecuted to this court, as is authorized by section 2857 of the Code.

The progenitors of these respective statutes were construed by this court in the case of *Nooe's Ex'r v. Garner's Adm'r*, 70 Ala. 443, which was a proceeding very similar to this, though the question of fact to be determined was different. The rules of evidence as to the weight and sufficiency of evidence to justify an affirmance, a reversal, or a rendition, on the respective appeal, were thus declared by this court:

"Our former decisions have declared three rules, from which we have no wish to depart:

"First. When a contest of fact, properly triable before a jury, is, by consent, submitted to the judge presiding for decision. In this class of cases, this court will not review the finding of the judge on the facts, any more than it would the finding of a jury. It is not assignable as error.—*Etheridge v. Malempre*, 18 Ala. 565; *Barnes v. Mayor*, 19 Ala. 707; *Bott v. McCoy*, 20 Ala. 578 [56 Am. Dec. 223]; *De Vendell v. Hamilton*, 27 Ala. 156. We have a recent statute which authorizes the submission of disputed questions of fact to the court

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without a jury, but it does not affect this case.—Code of 1876, § 3029.

“Second. When the case is properly triable before the court, as in chancery causes, but is tried on testimony reduced to writing, not examined in the presence of the court. A finding thus rendered is presumed to be correct, and will not be reversed in this court, unless there is a decided preponderance of evidence against the conclusion he attained.—*Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387.

“Third. When the law authorizes the disputed question to be tried, and it is tried, by the court without a jury, on testimony given viva voce in the presence of the court. In such cases the rule is not to reverse the finding, unless it is so manifestly against the evidence that a judge at nisi prius would set aside the verdict of a jury rendered on the same testimony.”—70 Ala. 446, 447.

After a careful examination of this record we are of the opinion that we should render a like judgment in this case to that rendered in *Nooe's Case*, *supra*. We have reached the conclusion that the probate judge rendered the proper judgment on the original hearing, but that he should have awarded a new trial on the showing made by movants, and that the circuit judge should have reversed and remanded to the probate court for a new trial, instead of reversing and rendering, as he did.

The sole disputed question was and is whether or not appellant here, Cornelia Jackson, was ever legally married to the deceased, Jim Bell, or whether their marriage as freedman and freedwoman was ratified and confirmed by the ordinance of September 22, 1865, relative to this subject. If the evidence of Cornelia Jackson is true, there was a valid marriage between her and

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Jim Bell, and George Bell, the other appellant here, is their legitimate child, and hence the subsequent marriage between the appellee, Mary Bell, and deceased, was bigamous and void, and the daughter of this marriage, the other appellee, is an illegitimate child. As before stated, we are of the opinion that the evidence on the original trial before the probate court fully justified the probate judge in finding as he did, but that a sufficient showing was made, on the application for a new trial, to require that the probate judge order a new trial. This, in order that the testimony of Cornelia Jackson might be disproved if untrue, or corroborated if true. There is left no room to doubt from this record that the relation of husband and wife existed between Cornelia Jackson and the deceased prior to deceased's formal marriage to Mary Bell, and that George Bell is the child of that relation; but whether this relation was legal or illegal, and whether ratified by the ordinance of the Constitution of 1865, was the only disputed question. Upon its solution depend all other questions.

It was said by this court in the case of *Washington v. Washington*, 69 Ala. 281, in passing upon a similar question, and which was the first case construing the ordinance and declaring its effect: "As matter of fact, by universal usage, by the encouragement and consent of the master, the relation of husband and wife was formed between slaves, and often the marriage solemnized by the rites and ceremonies attending the solemnization of the marriage of their owners. The moral obligation resulting from the union the master enjoined them to observe, and public sentiment so far respected the union that the master who wantonly separated husband and wife provoked from his neighbors indignation and reproach. While, in the contemplation of law,

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there was not a binding or obligatory marriage, there was a union of moral force and obligation. In *Smith v. State*, 9 Ala. 996, said Ormond, J., 'whilst we admit the moral obligation which natural law imposes in the relation of husband and wife among slaves, all its legal consequences must flow from the municipal law.' "

In the case of *Woods v. Moten*, 129 Ala. 228, 30 South. 324, it was said: "After emancipation, in order to ratify marriages between freedmen and freedwomen, and to legitimate the issue of such marriages or cohabitations, the convention of the people on the 29th of September, 1865, passed an ordinance declaring, among other things, that 'in all cases of freedmen and freedwomen, who are now living together recognizing each other as man and wife, be it ordained that the same are hereby declared to be man and wife, and bound by legal obligations of such relationship.' 'The issue of such marriage or cohabitation are hereby legitimized, and shall be held to the same relations and obligations from and to their parents, as if born in lawful wedlock.'—Ordinance 39, Code 1867, p. 64."

It therefore follows that the judgment of the circuit court is reversed, and the cause remanded, that that court may reverse the judgment of the probate court and remand the cause to the probate court for another trial, whereat the questions of dispute will be reopened for further proof if it can be made.

Reversed and remanded, with instructions.

DOWDELL, C. J., and ANDERSON, McCLELLAN, and SOMERVILLE, JJ., concur. SAYRE and DE GRAFFENRIED, JJ., dissent, being of the opinion that the judgment of the circuit court should be affirmed.

DE GRAFFENRIED, J.—(dissenting).—Marriage is the "civil status or personal relation of one man and

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woman, which was lawfully entered into, is intended to continue during their joint lives, is not dissoluble by their consent or agreement, and which involves the reciprocal rights and obligations imposed by law upon such unions.”—26 Cyc. pp. 825, 832, subd. “d,” and 837, subd. “b.” Marriage is a union for the joint lives of the man and the woman, and can only be dissolved by the death of one of the parties to that union, or by a divorce from the bonds of matrimony. A man and a woman may live together *like* man and wife, and yet not be man and wife. The living together must contemplate that union which is to *continue* through the joint lives of the parties. Anything short of *that* is not marriage. Of course where a common-law marriage is relied upon, the acts of the parties and all that they said and did while living together are relevant as to what the parties intended by the relations which they established with each other. Where the parties obtained a license provided by statute and were married in accordance with the forms provided by statute, then the marriage is *conclusively* presumed, provided both parties were, at the time, capable of contracting the particular marriage (26 Cyc. 841) ; and he who assails such a marriage has the burden of proof on him to show its invalidity. While it is true that the rule in this state is “that marriage, like any other fact involved in a judicial inquiry, may be proved by circumstances, and direct and positive proof of the fact is not necessary.” (*Bynon v. State*, 117 Ala. 80, 23 South. 640, 67 Am. St. Rep. 163), nevertheless this rule in no way conflicts with that other rule that “if a marriage has actually taken place, the presumption is in favor of its validity” (26 Cyc. p. 880, subd. 4, and authorities cited). We also take it that the above rule in no way conflicts with the rule that if there were conflicting marriages of the

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same spouse, the presumption is that the second marriage is valid, and "the burden of showing the validity of the first marriage is on the party asserting it."—26 Cyc. p. 880, subd. 4, and authorities cited.

1. The undisputed facts in this case are as follows: On November 5, 1875, under a license issued on that day by Joseph Gothard, probate judge of Dallas county, Ala., Jim Bell was regularly married, by John Blevins, a minister of the gospel, to Mary Goldson. This marriage was in accordance with our statutes, and is shown by the records of Dallas county. Jim Bell and Mary Goldson were colored people and ex-slaves. After their said marriage they lived together continuously as husband and wife until Jim Bell was killed by the Tennessee Coal, Iron & Railway Company in October, 1910. During this period of 35 years, while these two people lived together as husband and wife, they raised a family of children and grandchildren, and at no time, during all that period, was the validity of their marriage questioned, and, so far as this record discloses, at no time during all that period was it claimed that Jim Bell had married previous to his marriage to said Mary Goldson. When Jim Bell was killed an administrator was appointed upon his estate, and this administrator collected \$1,102.24 from the Tennessee Coal, Iron & Railroad Company for causing his death. This fund is the cause of this litigation, and if this fund had not appeared after Jim Bell's death, we think it plain that the validity of his marriage to Mary Goldson would never have been questioned by any one. About 25 years before the death of Jim Bell a woman, Cornelia, was married to a man by the name of Jackson, in Montgomery county, Ala., under a license regularly issued, and the marriage was solemnized according to the forms of law. She so testified, and she fur-

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ther testified that there were six children born to her as the issue of this marriage. In spite of this marriage, however, this woman, Cornelia, and a son, George Bell, turned up, after the death of said Jim Bell, as claimants of said fund. They based this claim upon the proposition that shortly after emancipation—probably in August, 1865—this woman, Cornelia, was, by a minister of the gospel, but without license, married to said Jim Bell in Dallas county, and that after her marriage she lived with Jim Bell for several years, and while living with him as his wife bore him four children, among them George Bell, the others having died in infancy. In other words, this woman, Cornelia, by her testimony, if her testimony was true, brought herself, as the wife of Jim Bell, within the ordinance of September 29, 1865, which was construed and enforced by this court in *Washington v. Washington*, 69 Ala. 281. In the case of *Washington v. Washington*, the fact of the slave marriage and of the living together thereafter by the parties as husband and wife until the fall of 1866 was practically without dispute. In the instant case the only evidence which corroborates that of Cornelia as to her alleged marriage with Jim Bell is the evidence of her son, George Bell, unless, indeed, it be the fact that Jim Bell acknowledged that he was the father of George Bell, and after his marriage to Mary Goldson took George to live with him.

The fact that Jim Bell acknowledged George as his son we regard as possessing practically no value as evidence. The average negro, as a slave, and for a good many years after emancipation, regarded concubinage with as much complacency as did the patriarchs of old, and recognized, without hesitation or sense of shame, the child begotten by him out of wedlock. Neither are we disposed to place much faith in the uncorroborated

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statements of Cornelia and George as to the alleged marriage. Cornelia claims that the preacher married her and Jim "out of the book," but she produced no person who witnessed this marriage, and in this statement she is contradicted by Bill Bell, a brother of Jim Bell. It is true that Bill Bell is himself contradicted, but we are inclined to think that his testimony is of as much value as that of a woman who, if her testimony is true, committed a felony when she married Jackson, and deliberately bastardized her children by Jackson in order that she might share in the fund to which we have above referred. Neither are we disposed to place much reliance upon the testimony of George. He was quite a young child when his father married Mary Goldson, and while he claims that he remembers the time when his father and Cornelia lived together, and remembers that they recognized each other as husband and wife, it should be remembered that he made *no* such claim at *any time* to Mary Goldson during the 35 years that his father lived with her as her *husband*, and seems to have refreshed his recollection as to *these early incidents* of his childhood only after this \$1,102.24 came into the hands of Jim Bell's administrator. At any rate he nowhere testifies that he, at any time, questioned the legality of his father's marriage to Mary Goldson, or of his mother's marriage to Jackson, until after his father's death.

2. Marriage is a solemn thing. Upon it depends the title to our lands, the claim to our family names, and the vast interests which the laws governing the subject of the descent and distribution of the estates of those lying intestate protect. When, therefore, a marriage between a man and a woman is shown by the public records to have been duly solemnized, it should take a strong showing, indeed, for that marriage, in a pro-

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ceeding of this sort, to be held for naught. The evidence showing that such a marriage was invalid—that children the issue of such a marriage are illegitimate—should be clear indeed.

When the fact of marriage rests in parol, then the law looks to the acts and conduct of the parties to ascertain whether they were, in fact, ever married to each other. In the instant case Cornelia and Jim Bell each did a thing which sharply challenged the truth of Cornelia's statements as to what the true relations between her and Jim Bell actually were, viz., Cornelia and Jim Bell each married—Cornelia, a man named Jackson, and Jim Bell the woman named Mary Goldson. "The weight of authority and the decision of this court support the proposition that the presumptions of an actual marriage from the fact of continued cohabitation, etc., is rebutted by the fact of a subsequent permanent separation, without apparent cause, and the actual marriage soon after of one of the parties."—*Moore v. Heineke*, 119 Ala. 627, 24 South. 374. In the instant case, *both parties* married; and, while Cornelia, to bring herself within the operation of the ordinance of September, 1865, referred to in *Washington v. Washington*, *supra*, testified that she and Jim were married by a minister of the gospel, this part of her testimony is without corroboration, and is in fact contradicted by her subsequent marriage to Jackson. She may possibly have testified truthfully, but, if so, she needed testimony independent of her own to overcome her subsequent inconsistent act, viz., her marriage to Jackson, which rendered her a felon in the eyes of the law, if she was, when she married Jackson, as she now claims to have been, a married woman. George Bell's testimony does not help her. George was not born, according to all the testimony, until some time in 1867—two

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years after his mother's alleged marriage to Jim Bell. According to *his* testimony, Jim Bell, before he married Mary Goldson, was married to Harriet Winston, and he brought Harriet Winston in as a witness to prove this fact. Harriet swore that she also married Jim Bell before he married Mary, and that she lived with him as his wife about five years. The records of Dallas county show that Jim married Mary Goldson in November, 1875, and George could then have been only about eight years old. He claims that he lived with Jim Bell and Harriet Winston for some time before Jim was married to said Mary Goldson. If Harriet Winston swore truthfully—and she was the only witness on the part of appellants to the facts except the appellants themselves—then Jim Bell and Cornelia did *not* live together *after* 1870 and George could not have been, in 1870, more than three or four years old. It thus seems clear that George could not, in the nature of things, have known anything of the relations between his father and Cornelia. It is true that Cornelia claims to have lived with Jim for several years. It is also true that George claims to be old enough to remember when his father and mother lived together. But it is also true that he and Cornelia produced as their witness Harriet Winston and, in doing so, vouched for the truth of her statement that she also married Jim Bell, and that she lived with him for about five years. She testified: "After Jim Bell and myself were married, he brought a child to the place. The man here, George Bell, is the same boy that he brought. Jim Bell stayed with me about five years. I don't know how old George was when he was brought to me." It is, however, a noticeable fact that Harriet Winston does not claim that she ever heard of the alleged marriage of Jim Bell to Cornelia.

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There is one fact in this record to which we can look with absolute confidence: *Jim Bell was married to Mary Goldson in November, 1875.* That fact is shown by the public records of Dallas county. We also *know* that after that marriage Jim Bell and Mary Goldson lived together as husband and wife for a period of 35 years, and until Jim Bell died. We do not think that this marriage can be held for naught, and the children of that marriage held to be bastards, upon the showing made by the testimony of Cornelia Jackson, George Bell, and Harriet Winston. The testimony of these people is too unsatisfactory and, in places too contradictory for us to hold to it as the truth and we have referred to its main features only for the purpose of illustrating its unsatisfactory character.

The probate judge, it is true, had evidence before him which we do not possess, viz., he had before him the demeanor of the witnesses while they testified before him. That evidence, however, can not affect our opinion. The witnesses may have possessed the demeanor most circumspect, and they may have given in their testimony with the most faithful air of truth. Their evidence, no matter how impressively it may have fallen from their lips, is not sufficient to overcome the strong presumption with which the law surrounds the marriage which was solemnized in November, 1875; and we must get something more than the testimony of a woman who undertakes to show that she is a bigamist, and something more than the testimony of the son of that woman—a son whose own testimony shows that his recollection as to the events to which he testifies cannot be reliable—before we can consent that a status so well defined as that which existed between Jim Bell and Mary Goldson for a period of 35 years shall be overturned. The testimony of these two witnesses may be true, but

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it bears, within itself, too many evidences of its own falsity for us to place that high reliance upon it which the circumstances of this case demand.

Taking into consideration the extremely strong presumptions with which the law surrounds the marriage of Jim Bell and Mary Goldson, and the long period during which those parties, after that marriage, lived together as husband and wife, taking into consideration the inherent evidences of falsity which appear in the testimony of Cornelia Jackson, George Bell, and Harriet Winston, and the peculiar circumstances which gave rise to that evidence, it seems to us that the decree of the probate court was palpably against the evidence, and that it cannot be sustained.

3. The circuit judge evidently came to the above conclusions. We think that his judgment should be affirmed.

SAYRE, J., concurs in the above.

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Mandamus

(Decided May 15, 1913. 62 South. 775.)

1. *Divorce; Decree; Collateral Attack.*—Where the court had jurisdiction of the proceedings and the parties, and rendered a decree of divorce upon proof of the alleged ground for the divorce, such decree cannot be collaterally attacked, even if collusively obtained.

2. *Same; Leave to Remarry.*—The allowance of leave to remarry rests entirely in the discretion of the Chancellor, and where the court had jurisdiction of the subject matter and of the parties, and granted a divorce on proof of the grounds therefor, so much of the decree as allowed the respondent to remarry could not be collaterally attacked even if collusively obtained.

3. *Same; Alimony; Question for the Court.*—While the question, under the disputed fact of the validity of the marriage between the parties should have been determined by the court, the equity of the wife's application for an allowance depending thereon, yet the inquiry

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as to the amount of the allowance was properly referred to the register, but where the evidence as to the validity of the marriage was reported to the court by the Register, and was questioned by exceptions to the Register's report, the respondent had nothing of which he could complain.

4. *Same; Maintenance; Amount.*—Where a wife's marriage to the alleged husband is *prima facie* established, she is entitled as a matter of legal right to some provision for her maintenance, pending the suit, and to an allowance for attorney's fees; it does not follow, however, that because the husband's means are large that the allowance for maintenance should be large; in determining that matter, the court should consider the wife's character, means, ability to earn a livelihood, and possible complications arising in the proceedings.

5. *Same; Modification.*—Where future developments indicate the propriety of a change, allowances for maintenance and for counsel fees made in conformity with the ruling of this court, may be changed by the Chancellor.

6. *Mandamus; Interlocutory Order; Remedy.*—In cases to compel the vacation of an interlocutory order in a divorce proceedings, mandamus serves the purpose of an emergency appeal, and appellant may have what relief he shows himself entitled to, though, in his application for the writ, he seeks more than he is entitled to.

ORIGINAL petition in the Supreme Court.

Petition by G. B. Edwards for mandamus directed to the Hon. J. C. B. Gwin, judge of the city court of Bessemer, to require him to vacate and set aside an order and decree affirming or confirming the report of the special master granting to Maggie Edwards alimony and solicitor's fees, and adjudging that petitioner and Maggie Edwards were legally married. Mandamus awarded.

PERRY & BAUMGARDNER, and THETFORD & MCKENZIE, for appellant. Mandamus is the proper remedy.—144 Ala. 414. A *prima facie* case has been made for the issue of the rule nisi. The court cannot rid itself of the burden of determining the principal equities involved on which is based the allowance.—1 Barbour's Chan. 468; Sims Ch. 394. In determining the question of allowance the court must take into consideration the means of the wife and her ability to earn a livelihood,

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and will not allow fees or maintenance where the wife has an ample separate estate.—*Rast v. Rast*, 113 Ala. 322; *Bulke v. Bulke*, 55 South. 490; 14 Cyc. 752-4, and authorities supra. The testimony of the wife discloses that the alleged divorce between herself and her husband was procured and rendered by collusion and fraud existing between them, and courts do not permit a dissolution of the marriage relation by consent or collusion.—*Powell v. Powell*, 80 Ala. 595; *Ribet v. Ribet*, 39 Ala. 348. Hence, there was no valid marriage between petitioner and defendant, and he was not liable for maintenance or solicitor's fees.—*Ex parte Jones*, 172 Ala. 187. The former proceedings may be attacked in this proceeding.—*Ingram v. Ingram*, 143 Ala. 129.

GIBSON & DAVIS, and PINKNEY SCOTT, for appellee. The case presented does not make out the relief sought.—*Ex parte Jones*, 53 South. 261; s. c. 55 South. 491; *Wilkerson v. Wilkerson*, 133 Ala. 382.

SAYRE, J.—We are not much impressed with the idea that complainant in the court below will be entitled to relief, either by way of divorce or by way of an annulment of his marriage with defendant, on any ground alleged in his bill, though that will remain an open question until the final decree shall be rendered. We state our impression, for the reason that complainant's denial of the lawfulness of his marriage with defendant and defendant's application for allowances pendente lite made it necessary in the court below to determine provisionally the question of marriage vel non between the parties.

The decree by which defendant was divorced from one of her former husbands may have been collusively obtained; that is, there may have been an understand-

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ing that no defense would be interposed, and that the defendant there should be allowed to marry again. But the court there had jurisdiction of the subject-matter and of the parties, and for aught appearing, the ground of divorce there set up existed, and was proved by trustworthy testimony. As for the decree allowing the defendant to marry again, that rested entirely in the chancellor's discretion, and neither that nor the decree of divorce can now be assailed collaterally on any ground so far taken against them. *Harrison v. Harrison*, 19 Ala. 499; 14 Cyc. 723.

The essential equity of the wife's application for allowances depended upon the disputed validity of the marriage between the parties. This question then should have been determined by the court, though the inquiry as to the amount of the allowances to be made was properly referred to the register. However, the evidence as to the main fact was reported to the court by the register, and, on exceptions, the court properly adjudged the fact. In this there was nothing of which the petitioner in this proceeding can complain.

As the case appears to us, defendant has no great claim on the court's consideration in respect to the allowances claimed by her. But we do not propose to engage in an uncomplimentary discussion of the affairs of these people. Defendant, her marriage with complainant having been established *prima facie*, is entitled as of legal right to some provision for her maintenance pending the suit, and probably, also, she should have an allowance to aid her in the employment of counsel. But it does not follow that because complainant's means are large the allowances to defendant should be large. The court should consider what manner of woman she appears to be, her means, her ability to earn a livelihood, and what promise of complication the pro-

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ceeding holds. *Bulke v. Bulke*, 173 Ala. 138, 55 South. 490. In the circumstances of these parties, we are of opinion that an allowance of \$50 a month for maintenance and \$100 for her counsel would be proper. Allowances made in conformity with the view we hold at this time may be changed by the chancellor if the litigation should persist and future developments shall indicate the propriety of a change. *Ex parte Jones*, 172 Ala. 186, 55 South. 491.

Mandamus in cases of this character serves the purpose of an emergency appeal. Appellant may have what relief he shows himself entitled to, though in his application for the writ he sought too much. A writ of mandamus will issue requiring a decree in the court below to accord with the views we have expressed, unless the chancellor upon being informed of our conclusion shall make such decree without the writ.

Mandamus awarded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Mandamus.

(Decided June 30, 1913. 63 South. 83.)

1. *Highways; State Commission; Statute; Construction.*—Acts 1911, p. 223, is entitled to a liberal construction so as to give effect to the purposes of the legislature to afford state aid and supervision in the construction and maintenance of roads which received state aid.

2. *Same; State Aid for County Roads.*—Under section 6, Acts 1911, p. 223, no county is entitled to receive from the state more than one-half of the cost of any road.

3. *Same.*—Under sections 9 and 10 of said Act, if the money is not actually expended or the work actually performed within the time prescribed a mere contract for the work to be done will not constitute a use of the money within the time limited, unless said contract

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and contractor's bond for a road actually begun were approved by the Commission with the understanding that the contract should constitute a use of the money agreed to be paid thereunder.

4. *Same; Rules and Regulations.*—Where a county entered into a contract late in 1912, for the construction of a road, and the contractor's bond was approved by the State Highway Commission, but approved only for the expenditure of the 1912 apportionment, the limitation imposed by the Commission was reasonable, and was a valid exercise of the power to make rules and regulations conferred upon it by, Acts 1911, p. 223.

5. *Same.*—The facts examined and it is held that the county was entitled to one-half of the money expended in 1912 from the apportionment made to it in 1911, all of the 1912 apportionment and the balance of one-half of the total cost from the 1913 apportionment.

6. *Pleading; Demurrer; Admission.*—The allegation in an answer that a county road contractor's bond was only approved by the State Highway Commission for the state funds apportioned to that county for the year 1912 must be treated as true on demurrer to such answer.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Mandamus by the State, on the relation of Jefferson County, against R. E. Spraggins and others, to compel respondents, as members of the State Highway Commission, to secure payment to the relator of the sums appropriated to its use out of the State Highway Improvement fund in the years 1911 and 1912. From a judgment for the relator, the respondents appeal. Reversed and remanded.

R. C. BRICKELL, Attorney General, for the State. Under section 10 of Acts 1911, p. 223, the petition in this case shows that the monies apportioned for 1911, to Jefferson County by the State Highway Commission, has not been used within the time limit, and all unexpended balances reverted to the general road fund to be again subdivided among all the other counties in the state.—*Park v. Candler*, 39 S. E. 89.

W. K. TERRY, for appellee. Appellee contends that under the Act the use of the money had been contracted

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for properly under the statute, and that, therefore, the appropriation became due and payable.—17 S. W. 150; Acts 1911, p. 223.

DE GRAFFENRIED, J.—In the latter part of the year 1912 the board of revenue of Jefferson county entered into a contract with Wallace Bros. & Young, whereby said Wallace Bros. & Young obligated themselves to construct a public road in accordance with certain plans and specifications, and which is known as the "Stouts Mountain Road." The road was to be three miles in length, and its total cost was to be \$6,711.92. Wallace Bros. & Young were required to make, as a part of their contract, a bond in the sum of \$10,000 "for the faithful performance of their contract."

By an act approved April 5, 1911, the "state highway commission" was created, and its powers defined. Of course, the act is to receive that construction at the hands of the courts which will carry into effect the legislative purpose which called it into existence. The true purpose of the act is expressed in that part of its title which says that it was enacted "to give state aid and state supervision over all public roads, culverts and bridges of the state for construction of a permanent nature and the maintenance thereof wherein any portion of the" funds of the state is "used for such purpose." It is manifest that the Legislature intended, when it passed the act, to foster and encourage road building in Alabama, to provide a method whereby public roads shall be skillfully and intelligently constructed and maintained, and to protect the counties and people of the state from losses necessarily entailed in building roads unskillfully and in ignorance of scientific methods. For this reason, section 7 of the act (see Pamph. Gen. Acts 1911, p. 223) provides: "That as soon as practicable

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the highway commission shall prepare and adopt such rules and regulations for the construction, improvement and maintenance of public roads, culverts and bridges as they shall deem most suitable for the requirements of and bring the most practical results to the several counties of the state. Such rules and regulations shall be printed and several copies shall be forwarded to the probate judge and county commissioners or boards of revenue in the state for general distribution. Such rules and regulations may be amended from time to time, but such amendments must be printed and distributed not later than March 1st of each year."

1. It is, however, the evident purpose of the Legislature that no county shall receive, as aid to it in the construction of any public road, from the state money in excess of one-half of the cost of such road. This is rendered certain by section 6 of the act, which provides as follows: "No money shall be drawn from the state road fund by any county until the said county shall have appropriated and rendered available a sum of money equal in amount to the sum to be drawn from the state road fund."

2. It is also clear that the state intends—in order that a stimulus may be applied to counties in the matter of road building under the act—that no county shall receive any part of the fund which is appropriated to its use for *one* year, unless that fund is used by the county by the *end* of the *next succeeding* year. This is evident from the language of section 10 of the act, which provides as follows: "That on or before the first day of February of each year every county treasurer or other proper authority shall certify to the state highway commission the amount of money expended for all purposes in road construction and maintenance and for bridges in his county during the preceding year. On or before the

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first of February of each year, the highway commission shall notify the probate judge of each county of the amount of money available that may be expended on public roads in said county during such year. Should any portion of the money be appropriated for the benefit of any county not be *used* by said county during the current year for which the same was appropriated, such sum of money shall remain in the state treasury for the *future use and benefit* of said county, provided that all sums of money so appropriated and not *used* by any such county for a period of two years, shall revert to and become a part of the general fund for the improvement of the state highways of Alabama, and shall be in addition to the annual appropriation made therefor."

The language of the above-quoted section 10 must be read in connection with the language of that part of section 9 of the act which is as follows: "Where any work is done by contract the state highway commission shall require a bond of the contractor for the faithful performance of the work, the amount of the bond to be double the contract price and to be approved by the members of the commission. The highway engineer may authorize partial payments to any contractor performing any highway or bridge improvement, under the provisions of this act as the same progresses. The progress estimates shall be based upon materials in place and labor expended thereon, but not more than eighty-five per cent. of the contract price of the work as it is completed shall be paid in advance of the full completion and acceptance of such improvement. At least fifteen per cent. of the full contract price of any such work or improvement shall be withheld until the work is satisfactorily completed and accepted by the state highway engineer. Provided, however, that in cases of emergency where it is necessary for the court of county commissioners or

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boards of revenue or other proper authorities in the county to make repairs on bridges or highways before they can confer with the state highway commission they shall be authorized to do said work without waiting to consult with the state highway commission."

When so read, we think that, unless there is "*a bond of the contractor*" which is "*approved by the members of the commission,*" no money can be held to have been used by a county in *any one year* which is not represented by material actually supplied or work actually done on the state aid road during that year. Of course, if a mile of the road has in *fact* been built during a particular year, then the money for building the road has actually been used by the county, within the meaning of the act, during that year, although no money has actually been paid out by the county for the mile of road so built. The work is there in the road to show for the money, and it does not matter to the state whether the debt thereby created has been paid or not. When, however, the building of a state aid road is actually *begun* in a given year, under a *contract taken and approved by the state highway commission*, then it was the manifest purpose of the Legislature to declare that the contract shall determine what amount, in each year, the county is to be held to have used. In the instant case the contract is not before us, and we do not know its terms. We find, however, in the answer of the state highway commission, the following: "Respondents say that the contract for the work to be done on the roads of Jefferson county, as set forth in petition, was not approved by respondents, nor was the bond of the contractor approved by them, as required by section 9 of the act creating the state highway commission, until the 16th day of December, 1912, and was then only approved by them for the expenditure of the state funds appropriated for the year 1912."

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It is evident from the language of the above-quoted subdivision 9 of the act, which provides that "where any work is done by contract the state highway commission shall require a bond of the contractor for the faithful performance of the work, the amount of the bond to be double the contract price and to be approved by the members of the commission," that it is not contemplated by the act that a county, by creating a *contractual liability merely*, in one year can be held to have used, within the meaning of the act, funds appropriated for a *previous* year, unless the state highway commission expressly or impliedly *consents* thereto. In fact, the act, in section 6, provides that "no money *shall* be drawn from the state road fund by any county until the said county shall have appropriated and rendered available a sum of money equal in amount to the sum to be drawn from the state road fund," and subdivision 14 of the act provides that "in no instance shall the amount authorized to be paid out of the state treasury *exceed* that which may for the same purpose *be paid out* of the treasury of the county in which such contract is made." It is thus the purpose of the act to declare that for each dollar which a county draws from the state for a state aid road the county must show that it has expended a dollar on that same road. If it calls on the state for aid for a road which has not been completed, but which rests merely in *contract*, then it must show that the contract was approved by the state highway commission, with the express or implied understanding, on the part of the commission, that the liability incurred by the contract would be accepted by the commission as a *use* of the money contracted to be paid for such road by the county. This conclusion follows not only from the provisions of the act which we have already quoted, but also from the following provision in section 14 of the act,

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viz.: "The said state highway commission is hereby authorized and empowered to make all such rules and regulations as are necessary and needful looking to the *speedy* completion of *all* contracts and they may authorize the payment of such sum of money as in their judgment is necessary for such purpose before the completion of any contract, but in no instance shall the amount authorized to be paid out of the state treasury exceed that which may, for the same purpose, be paid out of the treasury of the county in which such contract is made."

3. As it is the purpose of the act to require that every dollar of the state's money which is appropriated for the use of a county shall *speedily* find its way into its equivalent in a public road of that county, and that any money which is so appropriated, which is not *used* by the county for which it was appropriated within the *year succeeding* such appropriation, "shall revert to and become a part of the general fund for the improvement of the state highways of Alabama," we think it evident that Jefferson county was not authorized to defeat the last-quoted provision of the act, in so far as the appropriation for 1911 is concerned, simply by letting a contract in the latter part of 1912 for the building of a road which could not have been completed in the year 1912 in the absence of an agreement, express or implied, on the part of the state highway commission, that the *contractual liability* thereby created would be accepted by the commission as an actual use of the money appropriated for 1911 for the stated purpose. The mere appropriation by Jefferson county of the sum of \$4,000 to be used in constructing said road was not *alone* sufficient to authorize it to demand of the state highway commission the appropriation of \$2,000 for the year 1911 and the sum of \$2,000 for the year 1912. It had, under the terms of the act, to go further than this. It had to show that

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it had actually built a road of the value of \$8,000 during said years, or that, with the consent of the highway commission, it had actually bound itself to pay \$8,000 in the near future for the building of the road, and that when it so bound itself the appropriation for 1911—the year *previous* to the making of the contract, and the year *previous* to beginning the building of the road—was understood between the county and the state highway commission to have been set apart to the particular improvement, and thereby, in the broad sense of the word *use*, to have been actually used by the county. It was not the purpose of the Legislature to permit a laggard county, for the use of which money had been appropriated in *one* year by simply making a contract some time during the *next succeeding* year, to thereby place itself on the same footing and entitle itself to the same consideration and treatment as a diligent county which, by actual *road building*, and by the actual expenditure of its own money during the period named by the act, had indicated not only its technical legal, but its high moral, right to the money which had been appropriated by the state for its use and benefit. The prize is for the diligent, and it is but right that, if a county is in fact unable or unwilling to avail itself, within the terms of the act, of the state's money offered each year to each county as a reward for diligence and efficiency in public road building, such money so appropriated for the use of such county shall go back into the "general fund for the improvement of the state highway of Alabama." The act under consideration is a stimulus to intelligent public road building in Alabama. It should, as we have already said, receive a liberal construction in order that it may accomplish the ends for which it was designed; but it must not be construed so liberally in the interest of counties which are unable to bring themselves within its

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terms as to defeat the real purpose of the legislators who placed it among our statutes.

4. It seems that in the year 1911 there was appropriated for the use of Jefferson county, out of the fund for the improvement of the state highways, the sum of \$2,000. Under the terms of the act Jefferson county had, until January 1, 1913, the right to the use of this fund for the purpose of building, under the terms of the act, a state aid road. In the year 1912 a like sum was appropriated for the use of the county, and the county has, until January 1, 1914, the right to use said sum for the indicated purpose under the terms of the act. In August, 1912, the county of Jefferson took up with the state highway commission the building of the road to which we have above referred. The commission agreed to the construction of the road, and the engineer of the commission approved the plans and specifications of said road on August 26, 1912. The county of Jefferson thereupon, on the 24th day of October, 1912, made a contract, to which we have already referred, with Wallace Bros. & Young for the construction of said road, and in the contract agreed to pay him \$6,711.92 therefor.

This contract, however, was not approved by the state highway commission until the *16th day of December, 1912*, and then *only* "for the expenditure of the state's funds appropriated for the year 1912." We know this because the answer of the commission to the petition in this case says so, and the court sustained a demurrer to that answer. We must, therefore, treat that statement in the answer as true.

The contract, *therefore*, cannot be invoked as creating a just claim against the state aid fund, by virtue of the *contractual liability thereby created*, until its approval on December 16, 1912. Taking into consideration the

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fact that the act under discussion is an act which can only be given effect through a commission appointed for the purpose, and that therefore it was essential that, in its administration, the state highway commission should be vested with the exercise of a reasonable discretion as to the manner in which and the time when the money which the law places under their control shall be made subject to the call of the counties entitled to it, we are of opinion that the limitation which the commission placed upon the contract, viz., that the *liability* which Jefferson county assumed in making the contract, should not entitle the county, by virtue of that *liability merely*, to claim that the \$2,000, which had been appropriated for the use of that county for the year 1911, had been *used* by the county during the year 1912, the year in which the contract was made.

Modern conditions require that many of our laws shall find practical administration through commissions raised for that purpose, and courts should uphold all of their reasonable rules, regulations, and orders, when they are made in good faith for the purpose of giving wise effect to the laws which they are required to administer.—*Railroad Commission of Ala. v. Northern Alabama Ry. Co.*, 182 Ala. 357, 62 South. 749; *Whaley v. State*, 168 Ala. 152, 52 South. 941, 30 L. R. A. (N. S.) 499; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543. We are therefore of the opinion that the county of Jefferson, if the answer of the state highway commission is true, is not entitled to have the \$2,000, which was appropriated to its use in 1911, paid over to it.

5. It appears, however, that Jefferson county, within the meaning of the act, expended the sum of \$2,000 upon the state aid road in 1912. It had, under the terms of the act, until January 1, 1913, within which to expend the \$2,000, which was appropriated to it for road pur-

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poses in 1911. As it spent \$2,000 on the road, it is entitled to demand and receive of the state highway commission, out of 1911 appropriation one-half of the sum so expended, viz., \$1,000. The building of the road was agreed to by the commission and, under the letter of the act, as the work had been done before the bond was formally approved by the commission in December, 1912, Jefferson county is entitled to said sum of \$1,000 out of said appropriation for 1911. It is, of course, entitled to all of the appropriation for the year 1912, and to a further sum out of any money appropriated to it for 1913, which will bring to the county, out of the state highway fund—if there has been an appropriation for 1913—one-half of the sum which it has obligated itself to pay for said road, viz.: One-half of the said sum of \$6,711.92, or \$3,355.46.

It follows from what we have above said that, in our opinion, the trial court improperly granted the peremptory writ of mandamus in this case. This cause is therefore reversed and remanded to the trial court for further proceedings in accordance with this opinion.

Reversed and remanded. All the Justices concur

SUBJECT INDEX

ABATEMENT AND REVIVAL.

Abatement and Revival; Another Action Pending; In Equity.—The pendency of a suit in equity is not grounds for a plea in abatement of an action at law; the remedy is to apply to equity to require the movant to elect as to which action he will first prosecute to judgment.—*So. Ry. Co. v. Hayes*, 465.

ACCORD AND SATISFACTION.

Accord and Satisfaction; Part Payment.—Where the claim sued on is disputed, an agreement of compromise accompanied by payment of a sum less than that claimed operates as an accord and satisfaction; the concession made by the one being a sufficient consideration for the concession made by the other without any release, receipt or discharge in writing.—*W. Ry. of Ala. v. Foshee*, 182.

Same; Pleading.—A replication alleging that an attorney's lien existed when an agreement of compromise was made, is not an answer to a plea of accord and satisfaction by reason of the compromise agreement.—*Ib.* 182.

ACTS CITED OR CONSTRUED.

- 1890-92 p. 478. *Kretzer v. Jackson*, 642.
- 1909 p. 317. (Sec. 32) *Edgar v. The State*, 36.
- 1911 p. 223. *Spragins v. State, ex rel. Jefferson Co.*, 663.
- 1911 p. 587. *Western U. Tel. Co. v. Dunlap*, 454.
- 1911 p. 636. *Ex parte Bozeman*, 91.

ACTIONS.

1. Misjoinder.

Action; Misjoinder; Trespass and Case.—Where, in one count it is alleged that the servants of defendant, acting within the scope of their authority, took and carried away or consumed personal property and also took charge of and injured certain oxen, and took charge of three wagons, and damaged two of them, it was bad for joining in one count both trespass and case.—*Interstate L. Co. v. Duke*, 484.

ADJOINING LAND OWNERS.

Adjoining Landowners; Injuries by Blasting.—Where blasting operations cause rock and other debris to be thrown upon the adjoining premises, it is a trespass for which the one blasting is liable, without regard to any negligence in the manner of blasting, unless the one blasting has acquired an express or implied easement against the other's premises; in the latter event, the one blasting is liable only for negligence.—*Ex parte B'ham Realty Co.*, 444.

Same.—There is no liability to adjoining landowners for the ordinary discomforts and injurious effects of lawful blasting operations on defendant's own premises, not constituting a nuisance, except for negligence in the manner of carrying on such blasting operations.—*Ib.* 444.

ADVERSE POSSESSION.

See Ejectment.

1. Extent of Color.

Adverse Possession; Extent of; Color.—The doctrine of the extension of possession to the confines of that described in the color of title is predicated only on the actual possession of a part, at least, of the land described; and an instrument otherwise ineffectual affords color of title only to the land described therein.—*Hale v. T. C. I. & R. R. Co.*, 507.

Adverse Possession; Elements; Intent.—Where a party occupies land to a fence because he believes the fence to be a division line, but without intent to claim beyond the fence if it should be beyond his line, his possession is not adverse, because of want of intent to claim land beyond the limits of his paper title.—*Ashford v. McKee*, 620.

Same; Boundaries; Agreed Line.—Where adjoining land owners agree on a dividing line, and each claims up to it as such, with knowledge of the claim by each other owner, the claim becomes hostile and adverse.—*Ib.* 620.

Appeal and Error; Harmless Error; Evidence.—Where the court erred in sustaining objection to a question as to whether a certain person was in control of the land at a specified time, the error was rendered harmless where the court almost immediately permitted the witness to testify that such person was in control of the land, claiming to own it, and that no other person claimed to own the land up to the time of such person's death, which occurred a number of years before.—*Ib.* 620.

Same.—Where the witness without objection proceeded and was permitted to answer the question at length, no harm resulted from sustaining objection to the question.—*Ib.* 620.

Same.—Where a witness subsequently testified that he delivered a deed to plaintiff at a certain place, and that the only possession he delivered to plaintiff was in delivering to him the deed conveying the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the section in which the land was located, any error in sustaining an objection to a question to such witness whether he put plaintiff in possession of the land down to and including a certain line, was rendered harmless.—*Ib.* 620.

Same; Review; Record; Matters Included.—Although the bill of exceptions recites that the motion for new trial was submitted on May 13, 1910, the same being the day to which the April term of the court had been adjourned, the order on the motion for new trial was not reviewable where there was no entry in the record proper showing that the court was lawfully in session on that day. (Section 3238, 3248, Code 1907.)—*Ib.* 620.

Adverse Possession; Claim or Declaration; Conveyance.—Where a person deeded certain land, which was his home place, to M., who either never took possession of the land, or abandoned it shortly thereafter, returning the deed to his grantor, telling him he did not wish the land, and the grantor remained in possession until he conveyed the land to K. in 1906, the original owner's possession was adverse, co-extensive with the boundaries of his original title, and it was not necessary that he should file a claim or declaration under Acts 1893, page 478, in order to claim adversely, as he was claiming under such original title, and under a surrender or gift to him by his grantee of so much of the land as he had previously conveyed to such grantee.—*Kretzer v. Jackson*, 642.

APPEAL AND ERROR.

1. Showing Error.

(a) Criminal.

Criminal Law; Showing Error; Burden of Proof.—The burden of showing error is upon an appellant, but where error is shown in a criminal case, the burden of showing that it did not injure defendant is upon the state.—*Smith v. The State*, 10.

(b) Civil.

Appeal and Error; Showing Error; Exceptions.—Where objections to improper remarks of counsel were made and overruled separately but only one exception is taken to all of the rulings, and some of the remarks are not improper or prejudicial, the exception cannot be sustained on appeal.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same.—An objection to improper remarks of counsel without request for instructions to disregard such remark is not sufficient as a basis for an exception.—*Ib.* 273.

Same; Burden of Showing Error.—Doubtful recitals in the record will be construed most strongly against the exceptor, and will not be held to carry the burden on him of showing error.—*Ib.* 273.

Appeal and Error; Showing Error; Joint Assignment.—Where the matter of overruling certain pleas is included in one assignment, the assignment is not sustained if anyone of said pleas were bad.—*L. & N. R. R. Co. v. Turney*, 398.

2. Harmless Error.

(a) Evidence.

Appeal and Error; Harmless Error; Evidence.—Where there was ample other proof that deceased knew that defendant had the gun, it was not error to reversal to exclude the evidence of a witness, present at the time, who had testified that he saw a gun on defendant's person, as to whether deceased could have seen the gun.—*Smith v. The State*, 10.

Same.—Where evidence is afterwards excluded with instructions to the jury to disregard such evidence, the error in admitting it is cured.—*Ib.* 10.

Same.—The practice of excluding evidence generally, as by a ruling "excluding everything except what defendant said" with reference to a certain matter is not to be commended.—*Ib.* 10.

Same; Harmless Error; Evidence.—Evidence that defendant was connected with the running of a blind tiger was immaterial and its admission cannot be said to be harmless to the defendant.—*Ib.* 10.

Same.—Where a statement by a deceased immediately after he was shot did not identify the assailant or the circumstances of the assault, its admission cannot be said to be harmful.—*Ib.* 10.

Appeal and Error; Harmless; Evidence.—Where a witness has stated the facts upon which his conclusions are based, to allow the witness to testify as to whether another person did or did not know certain facts, will not necessitate a reversal, although error.—*L. & N. R. R. Co. v. Williams*, 138.

Appeal and Error; Harmless Error.—The admission of hearsay testimony corroborative of the only material point in dispute was prejudicial error as the court cannot say what effect its admission may have had on the jury.—*L. & N. R. R. Co. v. Cornelius*, 203.

Same.—Where the action is by a passenger for being carried beyond destination, the admission of evidence that it was the custom of defendant to put a step on the ground at the destination station to assist passengers to alight, and that on the day in question

APPEAL AND ERROR—Continued.

it was not done, if error, was cured where such evidence was subsequently stricken.—*Ib.* 203.

(b) Pleading.

Same; Harmless Error; Pleading.—Where the record shows elsewhere that defendant pleaded not guilty, and that the question of his guilt or innocence was properly submitted to the jury, the error of the judgment entry in showing that defendant's plea of not guilty was erroneously stricken, was harmless.—*McGay v. The State*, 41.

Appeal and Error; Harmless Error; Pleading.—Where the court erroneously construed counts charging negligence as charging willful or wanton injury, it must be presumed that the error was prejudicial, in the absence of a showing to the contrary.—*C. of Ga. Ry. Co. v. Chambers*, 155.

Same.—Where, after erroneously holding that counts charging simply negligence, charged willful or wanton injury, the court submitted to the jury the question of wanton injury with the instruction that contributory negligence is not an answer thereto, and the amount of the verdict indicated that punitive damages were awarded, the record shows that prejudicial error was committed.—*Ib.* 155.

Appeal and Error; Harmless Error; Pleading.—Where a cause is submitted to the jury on two counts, one alleging defective appliances, and the other the negligence of the superintendent of the master, the overruling of a demurrer to the count insufficiently alleging negligence of the superintendent, cannot be held harmless where there was a verdict for plaintiff, as there was nothing to show that the issues raised by the improper count were in any way eliminated.—*Woodward Iron Co. v. Marbut*, 310.

Same; Harmless Error; Pleading.—Where a miner was injured by the fall of rock, and the evidence tended to show that it was caused either by a defect in the props or the track, or a defect in the car which struck the props, the sustaining of the demurrer to a plea setting up the servant's failure to promptly notify the master of the defect in the track, cannot be held to be harmless.—*Gloss-S. S. & I. Co. v. Webster*, 322.

Appeal and Error; Harmless Error; Pleading.—Where demurrers were overruled to pleas which set up the same defense as the defense set up in pleas to which demurrers were sustained, the ruling was harmless, if error.—*B. R. L. & P. Co. v. Johnson*, 352.

Same; Harmless Error; Pleading.—Error in sustaining demurrer to special pleas is not prejudicial where all the evidence admissible under such pleas was admissible either under the general issue or other special pleas to which demurrers were overruled.—*L. & N. R. Co. v. Turney*, 398.

Appeal and Error; Harmless Error; Pleading.—The sustaining of demurrers to pleas setting up matter available under the general issue is harmless, where the general issue is pleaded.—*So. Ry. Co. v. Hayes*, 465.

(c) Not Affecting Result.

Appeal and Error; Harmless Error; Not Affecting Result.—Where in no event a plaintiff is entitled to recover, a judgment against him will not be reversed because of special errors committed on the trial.—*Adams v. Corona C. & I. Co.*, 127.

(d) Instructions.

Appeal and Error; Harmless Error; Instruction.—The improper overruling of a demurrer to those counts of the complaint which fall

APPEAL AND ERROR—Continued.

to show that the carrier had knowledge of the proposed search in time to protect the passenger was harmless where other counts sufficiently alleged such knowledge and the instructions given made such knowledge a condition precedent to such recovery.—*N. C. & St. L. Ry. v. Crosby*, 237.

Appeal and Error; Harmless Error; Instruction.—An instruction by the court that plaintiff claimed the right to recovery because defendant negligently allowed the machine to become defective, even if it was properly constructed, was a mere statement of plaintiff's contentions, and instructed no finding thereon; hence, defendant was not prejudiced thereby, even if plaintiff's claim was not supported by the evidence.—*Caldwell-W. F. M. Co. v. Watson*, 328.

Same; Harmless Error; Not Affecting Result.—Where the affirmative charge was properly given for defendant as to one of the counts, a refusal of a charge requested by plaintiff which was applicable only to that count, was harmless, if erroneous.—*Jones v. Adler*, 435.

Appeal and Error; Harmless Error; Charges.—Where a count in a complaint is withdrawn by the plaintiff before the jury retires, any error in refusing to charge the jury that they could not find for plaintiff under that count, is harmless.—*W. U. Tel. Co. v. Boteler*, 457.

Appeal and Error; Harmless Error; Instructions.—Where on the whole case plaintiff was entitled to the affirmative charge, any errors in instructions given or refused were harmless.—*Jeffreys v. Jeffreys*, 617.

3. Review.**(a) Presentation Below.**

Same; Review; Presentation Below.—Where the only objection to evidence was by a motion to exclude such evidence after it had gone to the jury, the objection was too late to authorize this court to review the court's action thereon.—*Smith v. The State*, 10.

Same; Presentation Below.—Error in admitting evidence cannot be reviewed where the action of the court in admitting it was not excepted to.—*Ib.* 10.

Appeal and Error; Questions Presented.—Where the court overruled a demurrer to the complaint on a specific ground, but did not decree as to other grounds, this court on appeal will only review the rulings on the grounds specified, notwithstanding the intimation by the court that some of the other grounds were well taken.—*City of Decatur v. So. Ry. Co.*, 531.

(b) Finding of Court.

Appeal and Error; Review; Finding.—Where a contest of fact which is properly triable before a jury is submitted by consent for decision by the court the appellate courts will treat the judge's findings of fact as a verdict of the jury.—*Bell v. Bell*, 645.

Same.—The finding of a trial judge as to facts, where the case is tried on written testimony will not be reversed on appeal unless there is a decided preponderance against the conclusion arrived at.—*Ib.* 645.

Same; Oral Evidence.—Where disputed questions of fact are tried before and decided by the trial court sitting as judge and jury, on testimony ore tenus, his finding will not be disturbed on appeal, unless it is so manifestly against the evidence that a trial judge would set aside a similar verdict rendered on the same testimony.—*Ib.* 645.

APPEAL AND ERROR—Continued.**(c) Remandment.**

Appeal and Error; Review; Remandment.—Where there was no error in the judgment of conviction, but there was error in the sentence imposed, the judgment will not be reversed except as to the sentence, and the case will be remanded for resentencing only, the object being to place the case before the trial judge for correct action beginning at the point of his erroneous departure.—*Ex parte Robinson*, 80.

(d) Matters Not Necessary to Decision.

Appeal and Error; Review; Matters Not Necessary to Decision.—Technical objections to a defendant's pleading will not be considered on appeal where plaintiff's evidence fails to show such negligence on the part of defendant as will authorize a recovery.—*Carlisle v. O. of Ga. Ry. Co.*, 195.

(e) Decisions of Intermediate Court.

Appeal and Error; Review; Decisions of Intermediate Court; Facts.—The decision of the Court of Appeals examined and held to amount to no more than the finding of the existence of certain facts or inferences to be drawn therefrom; which being true, this court will not review or revise the holding of said court, as it does not involve error as to question of law.—*Ex parte W. U. Tel. Co.*, 451.

Same; Appeal to Intermediate Court; Disposition of Cause.—Where the issue was the validity of a marriage between a freed man and a freed woman, and the probate court correctly held on the evidence before it that there was a valid marriage, but should have granted a new trial on motion therefor supported by affidavit submitted as to newly discovered evidence the circuit court, on the appeal from the probate court, should have reversed and remanded the cause to the probate court for a new trial, and it was error for that court to reverse the probate court and render judgment in favor of the opposite party.—*Bell, et al. v. Bell, et al.*, 645.

4. Right to Allege.

Same; Right to Allege.—Where a defendant took the initiative in eliciting part of the details of a difficulty between defendant and another which resulted in the arrest of defendant by deceased shortly before the homicide, the defendant could not object to the admissions of such details in evidence, although they were not admissible for the state.—*Smith v. The State*, 10.

5. Record.**(a) Presumptions.**

Appeal and Error; Presumptions; Record.—Where a reasonable intendment of the record clearly indicates that the thing did not exist, the court will not, in order to uphold the judgment, presume that such a thing might have existed.—*Edgar v. The State*, 36.

Appeal and Error; Record; Presumption.—In an action for trespass quare clausum, where defendant pleaded dedication of the locu in quo for a highway, and the bill of exceptions recited that defendant introduced in evidence, "the dedication of the road," but neither the form nor the language of the dedication, nor when, nor by whom, nor to whom it was made, was shown, it will be presumed that the dedication was a formal and absolute one made by the owner of the land for the use of the general public prior to the trespass complained of.—*Smith v. So. I. & S. Co.*, 482.

APPEAL AND ERROR—*Continued.*

(b) Matters Shown or to be Shown by.

Appeal and Error; Record; Matters to be Shown by.—Where no bill of exceptions was in the record, the action of the trial court in striking the plea of defendant cannot be reviewed, since such action must be presented by the bill of exceptions.—*McGay v. The State*, 41.

Appeal and Error; Record; Matters Not Included.—Where witnesses testified as to the location of a fence by reference to maps made exhibits to their depositions, the Chancellor's conclusion on the facts cannot be reviewed where the maps are not set out in the transcript.—*Hale v. T. C. I. & R. R. Co.*, 507.

6. Insistence On.

Appeal and Error; Insistence Upon; Necessity.—Where a reversal is to be had on other ground the appellate court may point out errors which should be avoided on new trial, although not insisted upon in brief; and this is true although a judgment will not be reversed solely because of errors assigned and not insisted upon.—*Warrior-P. C. Co. v. Shereda*, 118.

7. Transcript; Filing, Etc.

Appeal and Error; Transcript; Time of Filing.—Where the record in a cause is filed at the first call of the division to which the county belongs after the appeal is taken, the appeal will not be dismissed because the record was not filed within twenty days after the taking of the appeal.—*Sloss-S. S. & I. Co. v. Webster*, 322.

8. Assignments—Joint.

Appeal and Error; Assignments; Bad in Part.—If a plea, which was filed to two counts of the complaint was good as to either of the counts, an assignment of error that the court erred in overruling demurrer to such plea was not sustained.—*Jones v. Adler*, 435.

Same.—Where a plea was interposed to two counts of the complaint, and the plea was established as against either one of the two counts, an assignment that the court erred in refusing to charge that defendants had not proved such plea, cannot be sustained.—*Ib.* 435.

ATTACHMENT.

Attachment; Levy; Property in the Hands of the Court.—Where the sheriff held the property under the levy of an attachment regularly issued by a court of competent jurisdiction, an attempted levy of another attachment upon the same property in the hands of the sheriff without the consent of the court issuing the attachment under which it is held, is void, and creates no lien of any kind upon the property.—*Remington T. Co. v. Hall*, 527.

Same; Proceeding to Enforce; Equitable Relief.—Where an attaching creditor has acquired no lien or judgment against a foreign debtor by an attempted attachment, and there is no showing of fraud, he cannot maintain a bill against such attaching party of the property as not being the owner of the property, but must look alone to the attachment statute for his remedy, since the creation of the statutory proceedings by attachment did not create a new jurisdiction for courts of equity, simply by virtue thereof.—*Ib.* 527.

ATTORNEY AND CLIENT.

1. Lien of Attorney.

Attorney and Client; Lien; Protection Against Settlement.—Neither a party nor his attorney should be heard to say that an agreement of compromise between the parties to the suit was made in

ATTORNEY AND CLIENT—Continued.

actual or legal fraud of the right of the attorney to a lien; at least the attorney should be required to show by petition or motion in his own name his right to proceed with the suit notwithstanding the agreement of compromise, as the courts are not bound to inquire whether the attorney would be satisfied with the compromise.—*W. Ry. of Ala. v. Foshee*, 182.

BILLS OF EXCEPTIONS.

1. Presentation and Signing.

Bill of Exceptions; Presentation; Time.—A bill of exceptions must be presented to the trial judge within the time provided by section 3019, Code 1907, which must be shown by the endorsement of the judge thereon, and where not shown to have been presented within that time, such bill of exceptions must be stricken on motion as provided by section 3020, Code 1907.—*McCollister v. The State*, 8.

Bill of Exceptions; Filing; Time.—Under section 3019, Code 1907, a bill of exceptions presented 91 days after judgment has been entered, is not filed in time, and will be stricken on motion.—*McGay v. The State*, 41.

BOUNDARIES.

Boundaries; Pleading; Issues.—Where the issues involved the proper location of the boundary line between a subdivision owned by plaintiff and the adjacent subdivision owned by defendant, defendant should disclaim and suggest a disputed boundary line under the provisions of section 3843, Code 1907.—*Jeffreys v. Jeffreys*, 617.

CARRIERS.

1. Of Goods.

(a) Connecting Carriers.

Carriers; Freight; Connecting Carrier; Initial Carrier.—An initial carrier is not liable as a carrier of an interstate shipment over the lines of a connecting carrier, where the goods were held at their point of destination by the connecting carrier after a reasonable time for their removal subsequent to the mailing of notice of their arrival as required by section 6137, Code 1907.—*L. & N. R. R. Co. v. Breicer*, 172.

Same.—The provisions of U. S. Comp. St. 1911, p. 1307, do not make the initial carrier liable for any loss caused by a connecting carrier, where the connecting carrier's liability as a carrier had ceased.—*Ib.* 172.

Same; Loss or Injury; Nature of Liability.—Under the common law a carrier was liable as an insurer from the time he received the goods until he delivered them to the consignee, or his liability as carrier terminated under the law, except for losses occasioned by the owner or the acts of God or the public enemy.—*Ib.* 172.

Same; As Warehouseman; Duty.—Where a common carrier has no warehouse at the point of destination, after its duties as a carrier are at an end it may relieve itself from further liability by delivering the goods to a responsible warehouseman for or on account of the owner or consignee.—*Ib.* 172.

Same.—After a carrier's liability as a carrier has been terminated, the carrier is liable only as a warehouseman.—*Ib.* 172.

(b) Wrongful Delivery.

Carriers; Freight; Wrongful Delivery; Liability.—Where the agent of an express company was without knowledge as to the order,

CARRIERS—*Continued.*

and delivered the package to a person other than the consignee without requiring proof that the person to whom the delivery was made was connected with the consignee, except letters produced by such person addressed to the consignee, the express company was liable to the consignor for a wrongful delivery, notwithstanding the person receiving the package was the one who had actually ordered its contents from the consignor.—*So. Ex. Co. v. Ruth & Son*, 493.

(c) Limiting Liability.

Same; Limiting Liability; Presentation of Claim.—Under the provisions of section 4297, Code 1907, a clause in the contract of shipment requiring claims to be presented within 90 days is no defense to an action against an express company for a wrongful delivery of the goods.—*So. Ex. Co. v. Ruth & Son*, 493.

Same; Presentation; Time.—The beginning of an action against the express company within the time specified by the contract of affreightment for the presentation of a claim for damages, is a sufficient presentation of such claim.—*Ib.* 493.

(2) Of Passengers.

(a) Complaint and Pleas.

Carriers; Passengers; Injuries; Complaint.—The complaint examined and held that each count thereof on which the case was tried sufficiently alleged the negligence.—*W. Ry. of Ala. v. Foshee*, 182.

Carrier; Passenger; Injury; Matters Available Under General Issue.—Where it is alleged that the injuries were the result of negligence or of wantonness on the part of defendant or its servants or agents the fact that the injuries were due to unavoidable accident was available under the general issue because if due to unavoidable accident, it was not due to negligence or wantonness.—*Carlisle v. C. of Ga. Ry. Co.*, 195.

Same; Defenses.—A passenger's contributory negligence or assumption of risk is not a defense to counts alleging that the injuries were due to the wantonness of the carrier's agents or servants.—*Ib.* 195.

Same; Complaint.—Where each count of the complaint alleges facts sufficient to show prima facie negligence under the doctrine of *res ipsa loquitur*, in an action for injury to a passenger, the counts were not subject to demurrer.—*W. Ry. of Ala. v. McGraw*, 220.

Same.—Where each count alleges facts sufficient to raise the prima facie presumption of negligence under the doctrine of *res ipsa loquitur* for injury to a passenger, the counts were not defective for a failure to allege a particular or specific act of negligence.—*Ib.* 220.

Same; Negligence of Third Person.—Where the action was for injury to a passenger caused by derailment, pleas which allege generally that the derailment was caused by a third person, but which failed to negative that the negligence of defendant may have concurred with that of the third person to cause the injury, are insufficient on proper demurrer.—*Ib.* 220.

Carriers; Passengers; Injury; Complaint.—A complaint alleging that while plaintiff was a passenger on defendant's road, in consequence of the negligence of defendant, owing to the door becoming fastened or obstructed, she was confined for considerable time in the small room in the coach, and as a consequence suffered the injuries alleged in her complaint, was made uncomfortable, annoyed and

CARRIERS—Continued.

chagrined, that the attention of many people was called to the fact, that she was so confined, and that she was separated from her small children for a long time, sufficiently charged a breach of defendant's duty to carry her safely as a passenger.—*A. G. S. R. Co. v. Robinson*, 265.

Carriers; Passengers; Injury; Complaint.—A complaint alleging that while plaintiff, a passenger, was in the act of alighting from a street car, it started forward with a sudden violent jerk, throwing her to the floor and injuring her, and that her injuries were proximately caused by the negligence of defendant in the negligent manner in which it ran and operated its car, was good as against the demurrers interposed.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same; Pleas; Sufficiency.—Pleas alleging that while plaintiff was in the act of going from her seat to the door of the car, the car was in motion, that it was her duty to exercise reasonable care to support herself, but that she negligently failed to exercise such care, and that while standing in the aisle or on the platform while the car was in motion she negligently failed to support and maintain herself in a standing position, were not sufficient as an answer to an action for damages alleged to have been caused by a violent jerk of the car, as the passenger was preparing to alight, as they were susceptible of the construction that she failed to make use of the external supports afforded without alleging such facts as required such precaution, such as age or physical infirmity.—*Ib.* 273.

(b) Evidence.

Same; Evidence; Sufficiency.—The evidence examined and held not sufficient to present a question for the determination of the jury as to whether the passenger's slipping was caused by a defect in the steps.—*Carlisle v. C. of Ga. Ry. Co.*, 195.

(c) Setting Down Passengers.

Carriers; Setting Down Passengers; Time.—The carrier owes its passengers the duty to stop its train long enough for them to get off at their stopping place; while such length of time depends often upon peculiar circumstances, yet it is generally, such as passengers using reasonable diligence require in which to alight.—*L. & N. R. R. Co. v. Cornelius*, 203.

Same; Complaint.—A complaint averring that defendant negligently failed or refused to stop said train * * * a sufficient length of time for plaintiff to alight while the train was not in motion was not objectionable as requiring too long a stop, and as not alleging that plaintiff did not have a reasonable time in which to alight.—*Ib.* 203.

Same; Instruction.—Where the action was by a passenger for damages for being carried beyond her destination, a charge that the jury must find that defendant negligently failed to stop long enough for plaintiff to get off in safety, cannot be said to be erroneous, although not as comprehensive as it might have been.—*Ib.* 203.

(d) Presumptive Negligence.

Carriers; Passengers; Injuries; Presumptions.—A presumption prima facie will arise that the accident was due to the negligence of the carrier or its servant upon proof that an accident occurred to the vehicle on which the passenger was riding, and that injury occurred to the passenger therefrom.—*L. & N. R. R. Co. v. Godwin*, 218.

Carriers; Passengers; Injuries; Presumption.—Where a passenger is injured by the breaking down, overturning, derailment or

CARRIERS—Continued.

collision of a car on which he is riding, or sudden jolt of the train, or by some cause within the car, or by an obstruction on the track or near thereto, the presumption arises *prima facie* that the accident was due to the negligence of the carrier; this is not true, however, where the accident causing the injury is not to the vehicle, but to the passenger, nor where the injury is caused while the passenger is alighting from the vehicle by stepping on an object improperly left on the platform, etc., and in such a case, proof of the injury alone will not be sufficient to charge a carrier with negligence.—*W. Ry. of Ala. v. McGraw*, 220.

Same.—Where the injury to a passenger is such as to give rise to the presumption, under the doctrine of *res ipsa loquitur*, of negligence on the part of the carrier or its servant, the duty is on the carrier to exonerate itself from liability by showing that the accident was inevitable, or that it could not have been avoided by the exercise of the utmost care reasonably consistent with the conduct of the business.—*Id.* 220.

(e) Relation and Termination of.

Carriers; Passengers; Relation; Termination.—Although a carrier was not legally required to maintain a waiting room at that particular station under section 5489, Code 1907, yet, where the railroad company had built a station and a waiting room at such point it could not arbitrarily deny the use thereof to a particular passenger.—*Waldrop v. N. C. & St. L. Ry.*, 226.

Same.—In the case of steam railways the relation of carrier and passenger does not terminate at the moment the passenger alights at the station, but continues until the passenger has had a reasonable opportunity to leave the premises of the carrier in a proper manner and by the usual way.—*Id.* 226.

Same.—The relation of carrier and passenger is a contractual one, requiring the carrier merely to carry the passenger between the agreed points; but the law raises the duty of the carrier to care for its passenger's comfort and safety so long as the relation continues.—*Id.* 226.

Same.—Where a person goes to a railroad station with an intention in good faith to take passage upon the train, the carrier must provide him or her with a safe way of ingress and egress to and from the cars, and with a reasonably safe waiting place.—*Id.* 226.

Same; Destination.—A carrier performs its whole duty by conveying the passenger safely to his destination, in the absence of special circumstances, and is under no duty to care for the passenger while preparing to further continue his journey.—*Id.* 226.

Same.—If, upon reaching the depot at his destination, the passenger's condition is such that to at once leave the waiting room would be dangerous to his health and safety, he must be given reasonable opportunity to further safely continue his journey, or obtain assistance, and cannot be summarily ejected from the depot.—*Id.* 226.

Same.—The facts considered as stated and held to render defendant liable for injuries resulting to plaintiff from her expulsion from the depot.—*Id.* 226.

(f) Duty to Protect.

Carriers; Passengers; Duty to Protect.—While it is the duty of a common carrier to protect its passengers against violence, whether from its servants or strangers, the liability of the carrier to protect

CARRIERS—Continued.

from the misconduct of others arises only when the wrong is actually foreseen in time to prevent the misconduct, or is of such a nature and perpetrated under such circumstances that it might reasonably have been anticipated.—*N. C. & St. L. Ry. v. Crosby*, 237.

Same.—The duty to protect passengers is not confined to the carrier's vehicle, but extends throughout the continuance of the relation.—*Ib.* 237.

Same.—The degree of care required of a carrier to protect its passenger varies with time and place; a high degree of care being required while the passenger is on the vehicle, and only ordinary care while the passenger is waiting at the carrier's station.—*Ib.* 237.

Same.—Where a known officer of the law in the apparent exercise of his official authority disturbs the peace and personal security of a passenger, it is not the duty of the servants of the carrier to interfere unless the conduct of the officer is known to be illegal.—*Ib.* 237.

Same.—A carrier's servants are not bound to inquire whether an officer is acting officially and with lawful authority where such person is known to be an officer of the law invested with general authority, and acting under such apparent authority, arrests and searches the person of the passenger.—*Ib.* 237.

Same.—Where a passenger is disturbed by a servant of the carrier while engaged in some service the carrier's liability is grounded upon the breach of an absolute duty rather than on that of negligence.—*Ib.* 237.

Same; Action; Pleading.—In an action against a carrier for damages caused by reason of an illegal search of a passenger upon its premises, the complaint must state facts sufficient to show that the servants of the carrier should have intervened to protect the passenger, that is to say, a knowledge of the intended wrong, or reasonable grounds to anticipate it in time to interfere with its execution.—*Ib.* 237.

Same; Jury Question.—Where a plaintiff illegally searched on defendant's railway premises after she had begun her journey, went with an officer of the law first to the waiting room, and then to the freight room where she was searched, her failure to object or protest was not, as a matter of law, a consent to the search; that being a question for the jury under the evidence.—*Ib.* 237.

Same; Evidence.—The evidence examined and held insufficient to show that the servant of defendant knew that plaintiff was about to be assaulted or searched by the woman who claimed to have lost a watch, and who caused the search.—*Ib.* 237.

Same; Variance.—The fact that the servant of defendant said to the officer, "Search her in the freight room," does not constitute a variance as the language could not be construed as an instruction to make the search, but merely a direction as to the place and in response to the statement of the officer that plaintiff was accused of stealing a watch, and also as tending to show a knowledge of the search.—*Ib.* 237.

Same; Illegal Search; Defense.—Where the servants of the carrier participated in the illegal search of a passenger, the carrier is liable for assault and battery although the servant believed the search to be legal.—*Ib.* 237.

Same.—Where a peace officer did not request the servant of defendant railroad company to assist in searching plaintiff, the acts of the servant in participating in the illegal arrest and search cannot

CARRIERS—Continued.

be excused on the idea that an officer may require assistance even in making an illegal arrest.—*Ib.* 237.

Same.—Where the action is by a passenger for damages for a failure of the servant of the carrier to protect her from an illegal arrest and search, the burden is on the passenger to show knowledge, on the part of the servant that the search which was made by the officer was illegal.—*Ib.* 237.

Same; Evidence; Sufficiency.—The evidence examined and held insufficient to show that the servant of defendant knew of the illegality of the action of the officer.—*Ib.* 237.

Carriers; Passengers; Duty to Protect.—A carrier owes its passengers the affirmative duty to protect him from an assault by its servants, and no fault of the passenger, short of that producing necessity to strike in self-defense, will justify an assault by the carrier's servant or relieve the carrier from liability therefor; but where a passenger is assaulted on the carrier's premises by one not a servant of the carrier, the carrier's duty to protect the passenger does not arise until the carrier has reasonable grounds to believe that unless steps are taken to prevent it such violence or insult will occur, and at this time only is the carrier bound to interfere to save itself from liability for such damage.—*So. Ry. Co. v. Hanby*, 255.

Same; Complaint.—The complaint examined and it is held not sufficient to allege that the carrier knew, or from the attendant circumstances should have known of the threatened assault and battery on plaintiff by a stranger in time to have prevented the same, and therefore to be subject to the demurrers interposed.—*Ib.* 255.

(g) Care Required.

Same; Degree of Care.—A carrier owes to its passengers the exercise of the highest degree of care, skill and diligence known to persons engaged in that business.—*A. G. S. R. R. Co. v. Robinson*, 265.

Same; Evidence.—Where the passenger testified that she made every effort to unfasten the door to the room in which she was confined, and there was also evidence that the porter, after entering the room through a window, prized off either the lock or the receiver, the evidence was sufficient to make it a jury question as to the negligence of defendant in failing to have the fastenings to the door in a safe and proper condition.—*Ib.* 265.

(h) Instructions.

Same; Instructions.—A charge asserting that if plaintiff walked down the aisle of the car while the car was in motion, she assumed the risk of all proper and ordinary movements of the car, was not a proper charge as all of the testimony in the case showed that plaintiff was standing at the back of the car when injured, and there was no testimony tending to show that such passenger was injured while walking down the aisle.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same.—Where there was no allegation of willful injury and the count for wanton negligence had been eliminated, the court properly declined to instruct the jury that if any individual juror was not reasonably satisfied from the evidence that plaintiff was negligently, wantonly or willfully injured, then the jury could not find for plaintiff.—*Ib.* 273.

CHARGE OF COURT.

In particular actions or crimes, see that title.

1. Abstract.

Charge of Court; Abstract and Misleading.—Where the testimony of the witness for the state did not tend to show any conspiracy between him and defendant, a charge asserting that a conspiracy to do an unlawful act without any express agreement or implied agreement may exist, or that there may exist a community of purpose, to do such acts, and if the jury find that there is no testimony of such conspiracy between defendant and the witness, to take the life of deceased, then unless the witness' statement connecting defendant with the commission of the offense is corroborated by evidence other than his own, they cannot convict defendant on the theory of a conspiracy between such witness and defendant, or of a community of purpose to take the life of deceased, is abstract and misleading, if not otherwise objectionable.—*Tennison v. The State*, 1.

Same; Abstract.—A charge asserting that if the only evidence tending to corroborate the testimony of a witness that tends to connect defendant with the crime is that of the wife of the witness, and if the jury do not believe her testimony, they must find defendant not guilty, is abstract, where there is other testimony tending to corroborate such witness.—*Ib.* 1.

Same; Abstract Instructions.—There is no error in refusing abstract instructions.—*Smith v. The State*, 10.

Same; Abstract.—Charges predicated on matters concerning which there is no evidence should be refused as being abstract.—*N. C. & St. L. Ry. Co. v. Crosby*, 237.

2. Invading Jury's Province.

Same; Invading Province of Jury.—A charge asserting that a defendant cannot be convicted if the jury disbelieves the evidence of a certain witness, is invasive of the province of the jury, where there was evidence other than such testimony upon which they could have found a verdict of guilt.—*Tennison v. The State*, 1.

Charge of Court; Degree of Proof.—A charge asserting that if the mind of the jury was in a state of doubt or confusion as to plaintiff's right to recover, they should find for defendant, was properly refused, as under the charge, plaintiff was required to prove her case beyond the slightest doubt.—*A. G. S. R. R. Co. v. Robinson*, 265.

Same.—It is proper and advisable to refuse charges asserting that if the minds of the jury are in a state of confusion as to plaintiff's right of recovery, they should find for defendant, whether or not it was reversible error to give such charges.—*Ib.* 265.

3. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge asserting that if the evidence for the state consists of the statements of witnesses of the truth of which the jury have a reasonable doubt, they cannot convict defendant is properly refused as a misleading statement of the doctrine of reasonable doubt; the jury being authorized to convict although it may not believe everything testified to by witnesses for the state.—*Smith v. The State*, 10.

Charge of Court; Reasonable Doubt.—A charge that if anyone of the jurors is not reasonably satisfied from the evidence that plaintiff is entitled to recover, the jury cannot find for plaintiff, is proper.—*Travis v. L. & N. R. R. Co.*, 415.

CHARGE OF COURT—*Continued.*

4. Construction and Modification.

Same; Construction.—Charges must be taken in connection with the oral charge, and the oral charge in connection with the written charges.—*Robinson v. The State*, 43.

Same; Given as Written.—Requested written charges must be given or refused in the terms in which requested.—*Ib.* 43.

Same.—Where parts of oral charge, when unaided by other parts of the charge, were erroneous as incomplete statements of the burden and the sufficiency of proof on the issue of self-defense, but the proper qualifications were stated in the other parts of the oral charge, and in the written charges, no reversible error intervened, although the rule is different as to written charges which may not be qualified or modified, but may be explained by the oral charge.—*Ib.* 43.

Same; Construction.—Instructions will be construed as a whole, and when it can be fairly done, every statement on any given subject should be construed in connection with other statements on the subject, and if when so construed the law is correctly stated, the charge will be held free from error.—*Sheffield Co. v. Harris*, 357.

5. Presumptions of Innocence.

Same; Presumption of Innocence.—The presumption of innocence in favor of defendant continues until evidence has been introduced which satisfies the jury beyond a reasonable doubt of the guilt of defendant.—*Robinson v. The State*, 43.

6. Stating Testimony.

Charge of Court; Stating Testimony.—It was not error for the court while instructing the jury as to the law of the case to state to them that defendant had testified that deceased was a witness against him in a pending cause, and that defendant knew this when the killing occurred.—*Robinson v. The State*, 43.

Charge of Court; Statement of Conceded Facts.—Where it was conceded that a child was struck by a car while being operated by the servants of the street car company, and while they were acting within the line of their employment, and the only issue was whether the injuries were due to unavoidable accident, or to the wanton or simple negligence of the servant, it was not erroneous to charge that it was admitted that the child was injured by the servants of the street car company, as such was a mere statement of a conceded fact.—*Sheffield Co. v. Harris*, 357.

7. Covered by Those Given.

Charge of Court; Covered By Those Given.—The court will not be put in error for refusing charges substantially covered by written charges given.—*L. & N. R. R. Co. v. Williams*, 138.

Same; Cured by Other Instructions.—An instruction that it was the duty of the master to furnish an employee a reasonably safe place to work in, and reasonably safe appliances to work with, and to keep them in a reasonably safe condition, was not misleading when considered with the further instruction that defendant was bound to use only reasonable care as to the construction of the machine.—*Caldwell-W. F. & M. Co. v. Watson*, 326.

Charge of Court; Covered by Those Given.—The refusal of instructions which were substantially given in other instructions, was not error.—*Jones v. Adler*, 435.

CHARGE OF COURT—*Continued.*

8. Argumentative.

Charge of Court; Argumentative.—Argumentative charges are properly refused.—*N. C. & St. L. Ry. Co. v. Crosby*, 237.

Charge of Court; Argumentative.—It is proper to refuse instructions which are argumentative.—*Caldwell-W. F. & M. Co. v. Watson*, 326

9. Conforming to Issues and Evidence.

Same; Charge of Court; Conformity to Evidence.—Where the action was for a wrongful delivery, and the person receiving the package, though not the consignee named, had actually ordered the contents of the package from the shipper, and it was not shown that this was known to the agent of the company making the delivery, a charge asserting that the express company's agent had the right to assume that the shipment was made upon a bona fide order, and if he delivered the package of the party who made the order, the shipper could not recover for the wrongful delivery, was properly denied.—*So. Ex. Co. v. Ruth & Son*, 493.

CODE SECTIONS CITED OR CONSTRUED.

- 1627. Ex parte Smith, 116.
- 2086. Ex parte Boseman, 91.
- 2130. State v. Board of School Commissioners, 554.
- 2383. State v. Board of School Commissioners, 554.
- 2830. Jeffreys v. Jeffreys, 617.
- 2830. Kretzer v. Jackson, 642.
- 2838. Bickley v. Hays, 506.
- 2855. Bell, et al. v. Bell, et al., 645.
- 2857. Bell, et al. v. Bell, et al., 645.
- 2865. Bell, et al. v. Bell, et al., 645.
- 3011. Western Ry. of Ala. v. Foshee, 182.
- 3019. McOllister v. The State, 8.
- 3019. McGay v. The State, 41.
- 3020. McOllister v. The State, 8.
- 3118. Bell v. McLaughlin, 548.
- 3238. Ashford v. McKee, 620.
- 3249. Ashford v. McKee, 620.
- 3843. Jeffreys v. Jeffreys, 617.
- 3910. Warrior-Pratt C. Co. v. Shereda, 118.
- 3910. Sloss-S. S. & I. Co. v. Webster, 322.
- 3910. Caldwell-Watson F. & M. Co. v. Watson, 326.
- 3910. (sub. 2.) Cahaba Coal Co. v. Elliott, 298.
- 3910. (sub. 2.) Woodward Iron Co. v. Marbut, 310.
- 4196. Moss, et al. v. Nye, 544.
- 4288. Interstate Lumber Co. v. Duke, 484.
- 4297. Southern Ex. Co. v. Ruth & Son, 493.
- 4499. Bell v. Burkhalter, 527.
- 5321. B'ham Ry. L. & P. Co. v. Ely, 382.
- 5322. B'ham Ry. L. & P. Co. v. Ely, 382.
- 5336. Western Ry. of Ala. v. Foshee, 182.
- 5382. So. Ry. Co. v. Hayes, et al. 465.
- 5412. Ex parte Robinson, 30.
- 5443-48. Hale v. Tenn. C. L. & R. R. Co., 507.
- 5443-48. Bell v. McLaughlin, 550.
- 5473. Central of Ga. Ry. Co. v. Chambers, 155.
- 5473. Louisville & N. R. R. Co. v. Turney, 398.
- 5476. Louisville & N. R. R. Co. v. Turney, 398.

CODE SECTIONS CITED OR CONSTRUED.—*Continued.*

- 5489. Waldrop v. N. C. & St. L. Ry., 226.
- 6137. Louisville & N. R. R. Co. v. Brewer, 172.
- 7074. Travis v. L. & N. R. R. Co., 415.
- 7089. Johnson v. The State, 79.
- 7264. Robinson v. The State, 43.
- 7264. Hays v. The State, 76.
- 7564. Ex parte Smith, 116.
- 7620. Ex parte Robinson, 30.

COMPROMISE AND SETTLEMENT.

Compromise and Settlement; Pleading; Fraud.—Where the action was for injury to a passenger and the defense was compromise and settlement, a replication alleging that the settlement as executed by plaintiff was obtained by fraud in that plaintiff was in a weak mental and physical condition at the time, and was in ignorance of the extent and consequences of her injury, and incapable of appreciating their extent, and at the time had no legal advice or the advice of anyone else, knowing the extent of her injuries, or of the company's liability, and that the company's physician knowing of such facts and having plaintiff's confidence falsely represented to her that there was nothing serious the matter with her, for the fraudulent purpose of securing the settlement for a grossly inadequate sum, and that plaintiff on the same day repudiated the settlement, was not subject to the demurrers interposed.—*W. of Ala. Ry. Co. v. Foshee*, 182.

CONSTITUTION CITED OR CONSTRUED.

Section.

- 105. Ex parte Bozeman, 91.
- 221. Ex parte Bozeman, 91.
- 235. Jones v. Adler, et al., 435.
- 270. State v. Board of School Commissioners, 554.

CONSTITUTIONAL LAW.

See Statutes.

1. Presumption.

Constitutional Law; Presumption; Statutes.—Where it is reasonably doubtful whether a statute is constitutional the doubt should always be resolved in favor of its constitutionality.—*Ex parte Bozeman*, 91.

2. Construction.

Same; Construction.—Constitutions are adopted for practical purposes and are entitled to practical and reasonable interpretations, and if, when thus interpreted, a statute meets the constitutional provisions, its constitutionality should be upheld.—*Ex parte Bozeman*, 91.

Same; Extrinsic Aid In.—Where the language of the statute is clear and unambiguous, and there is no room for construction, the courts cannot attempt to arrive at the intention of the lawmakers by considering extrinsic matters, such as debates of the legislature or the debates of the Constitutional Convention.—*Ib.* 91.

3. Determination of.

Constitutional Law; Determination; Demurrer.—The constitutionality of section 3011, Code 1907, cannot be raised by demurrer to pleas.—*W. Ry. of Ala. v. Foshee*, 182.

CORPORATIONS.

1. Actions Against; Name.

Corporations; Actions Against; Misnomer.—A plea as to the name of the corporation "Southern Railway Company" and "The Southern Railway Company" is frivolous and technical and will not be considered.—*So. Ry. Co. v. Hayes*, 465.

COURTS.

1. Terms.

Courts; Terms; Adjourned Term.—An adjourned term of the circuit court is to be deemed a part of the regular term, and every step may be taken thereat which might have been taken at the regular term.—*Ashford v. McKee*, 620.

COURT RULES.

30. Circuit Ct. *Robinson v. The State*, 43.10. Chancery. *Bell v. Burkhalter*, 527.

CRIMINAL LAW.

For particular crimes, see that title.

1. Pleading and Proof.

Criminal Law; Pleading; Special Plea.—Except as to insanity and some other phases, justification or excuse need not be pleaded in criminal cases, but are open to proof under the general issue.—*Robinson v. The State*, 43.

Same; Elements in General; Presumption and Burden of Proof.—In criminal trials, the state must show beyond a reasonable doubt the offense charged, and if the proof fails to establish any of the elements necessary to constitute the crime for which a defendant is on trial, such defendant is entitled to an acquittal; the burden of proving a crime and lack of justification or excuse remains at all stages upon the prosecution except where justification or excuse is especially pleaded.—*Ib.* 43.

DAMAGES.

In particular actions, see that title.

1. Personal Injury.

Damages; Personal Injury; Measure.—The law has no fixed monetary measure for the assessment of damages for personal injury; they must be fixed by the jury in the exercise of their sound judgment in view of the circumstances of the case, subject to review under certain conditions.—*Sheffield Co. v. Harris*, 357.

Same; Instructions.—Where there was no dispute as to the fact and extent of the injuries, and the complaint charged both simple and wanton negligence, a charge that if plaintiff was entitled to recover, he was entitled to compensatory damages, and that the jury might add punitive damages as might be deemed reasonable from the evidence as a punishment for the injury, and that in making the estimate the jury should consider the injuries in the light of their experience and award such compensation as their sound discretion deemed fair considering the circumstances, properly limited the damages, and was not error.—*Ib.* 357.

2. Items of.

Damages; Items; Wages.—Where the employer of plaintiff during his sickness and convalescence, continued to pay him his usual

DAMAGES—Continued.

wages, he could not recover, in an action for damages for negligently causing said sickness, from defendant for loss of time from his work during such sickness.—*Travis v. L. & N. R. R. Co.*, 415. .

3. Amount.

Damages; Excessive; Loss of Hand.—A verdict for \$3,500 damages will not be set aside as excessive in an action for injuries to a girl two years old, where such injuries necessitated the amputation of her left arm between the elbow and wrist.—*Clover Cream Co. v. Diehl*, 429.

DEDICATION.

Dedication; Use of Land for Highways.—Evidence of the use of land by the public for a road for many years is sufficient to perfect dedication of the land for a highway.—*Smith v. Southern I. & S. Co.*, 482.

DESCENT AND DISTRIBUTION.**1. Lien of Heirs.**

Descent and Distribution; Heir's Action; Lien; Laches.—Where the heirs waited fourteen years before attempting to enforce their lien under the agreement in this case, but there had been no adverse assertion of rights or prejudicial delay, and the heirs owed no indebtedness, such lien was not concluded by laches.—*Caldwell v. Caldwell*, 590.

Same.—Where the other debts against the estate had been paid or were barred, each heir might assert his right to the beneficial interest in one-fourth of the liens created by the agreement, without recourse to an action through the personal representative of the ancestor.—*Ib.* 590.

Same; Contract Between Heirs; Construction.—Under the agreement in this case the decree erroneously charged one of the heirs, other than the administrator, with the rent of part of the land for certain years, not specified in the agreement.—*Ib.* 590.

DISCOVERY.

Discovery; Interrogatories; Answers as Evidence.—The answers of a party to interrogatories propounded by the adverse party under the statute are treated as pleading and evidence, and the party taking them may or may not introduce them in evidence, and the party answering cannot offer his own answers in evidence; but where the party taking interrogatories of the opposite party, introduces the answers in evidence, he must introduce them as a whole.—*So. Ry. Co. v. Hayes, et al.*, 465.

Same; Responsiveness.—Answers to interrogatories taken under the statute need not be responsive as the party required to answer may explain or avoid his answer.—*Ib.* 465.

Same; Failure to Answer; Penalty.—A party propounding interrogatories to the adverse party under the statute may insist on complete answers, or move to have the statutory penalties enforced for failure to answer.—*Ib.* 465.

DIVORCE AND ALIMONY.

Divorce; Decree; Collateral Attack.—Where the court had jurisdiction of the proceedings and the parties, and rendered a decree of divorce upon proof of the alleged ground for the divorce, such decree cannot be collaterally attacked, even if collusively obtained.—*Ex parte Edwards*, 659.

DIVORCE AND ALIMONY—*Continued.*

Same; Leave to Remarry.—The allowance of leave to remarry rests entirely in the discretion of the Chancellor, and where the court had jurisdiction of the subject matter and of the parties, and granted a divorce on proof of the grounds therefor, so much of the decree as allowed the respondent to remarry could not be collaterally attacked even if collusively obtained.—*Ib.* 659.

Same; Alimony; Question for the Court.—While the question, under the disputed fact of the validity of the marriage between the parties should have been determined by the court, the equity of the wife's application for an allowance depending thereon, yet the inquiry as to the amount of the allowance was properly referred to the register, but where the evidence as to the validity of the marriage was reported to the court by the Register, and was questioned by exceptions to the Register's report, the respondent had nothing of which he could complain.—*Ib.* 659.

Same; Maintenance; Amount.—Where a wife's marriage to the alleged husband is *prima facie* established, she is entitled as a matter of legal right to some provision for her maintenance, pending the suit, and to an allowance for attorney's fees; it does not follow, however, that because the husband's means are large that the allowance for maintenance should be large; in determining that matter, the court should consider the wife's character, means, ability to earn a livelihood, and possible complications arising in the proceedings.—*Ib.* 659.

Same; Modification.—Where future developments indicate the propriety of a change, allowances for maintenance and for counsel fees made in conformity with the ruling of this court, may be changed by the Chancellor.—*Ib.* 659.

EJECTMENT.

Ejectment; Pleadings; Admissions.—Where defendant entered a plea of not guilty, thereby admitting his possession of the land described in the complaint as a strip off of the west side of a certain governmental subdivision of a section, and plaintiff showed title to all of such subdivision, plaintiff was entitled to the general charge, although defendant introduced in evidence a deed to the adjacent subdivision and showed possession for seventeen years of the strip in dispute, since defendant could not claim any land but that embraced in his deed without showing compliance with sec. 2830, Code 1907.—*Jeffreys v. Jeffreys*, 617.

Same; Title of Plaintiff; Evidence.—In an ejectment action it was not error to permit plaintiff to introduce the deeds in his chain of title and follow it with evidence that the grantors therein were in possession when the deeds were executed.—*Ib.* 617.

Ejectment; Directing; Verdict.—Where there was conflicting evidence tending to support the theory of both parties as to a contested boundary line, neither party was entitled to have the verdict directed.—*Ashford v. McKee*, 620.

Same; Possession; Title.—Although possession is *prima facie* evidence of title, and sufficient to support a recovery in ejectment, yet when it is shown that the true title is in another, the intendment in favor of the possession ceases.—*Ib.* 620.

Same; Evidence.—The answer of a witness that he knew nothing about the occupancy of certain lands prior to the making of a survey except that the land was recognized as the land of plaintiff, and that he exercised ownership thereof, was objectionable as involving a conclusion of a witness.—*Ib.* 620.

EJECTMENT—*Continued.*

Same; General Reputation.—Where the character of possession of land is in issue, it cannot be proven by general reputation, nor by the opinion of witnesses as to the actual condition of the property.—*Ib.* 620.

Same; Exclusive Possession.—The question as to whether plaintiff was in exclusive possession of the land down to a specified line was objectionable as calling for a conclusion; although possession is a fact to which a witness may testify he may not testify that a person is in open and notorious possession.—*Ib.* 620.

Same.—A question whether the predecessor in title of plaintiff was in exclusive control of the land also called for a conclusion.—*Ib.* 620.

Same; Opinion.—In ejectment, a question whether a certain party was in control of the land at a specified time, was proper.—*Ib.* 620.

Same.—Where the action was over a disputed boundary line, and there was considerable testimony concerning an upper and a lower line, defendant contending that the upper or north line, as shown by the maps in the record, was the true line dividing the north and south half of the section, and plaintiff contending that the north-west quarter extended to the lower or south line, it was proper for a witness who was not a surveyor, but who had long acquaintance with the land, to testify whether he found surveyor's marks on trees all along the upper line through the section from east to west, as the evidence of ancient surveyor's marks along the line had a bearing on the question whether that was the true line.—*Ib.* 620.

Same.—Where the action was to determine a disputed boundary line between adjacent owners, it was competent to admit in evidence the deeds constituting defendant's chain of title, as well as certain mortgages executed by defendant's predecessors in title, as showing acts of ownership.—*Ib.* 620.

EQUITY.

For equitable actions, see that title.

1. Bill.

Equity; Bill; Demurrer; Appeal.—Where a demurrer is sustained to a bill, but the bill is not dismissed, an appeal must be taken therefrom within 30 days as required by section 2838, Code 1907, and an appeal taken therefrom more than 30 days after the enrollment of such decree confers no jurisdiction on this court to review said appeal, and it will be dismissed.—*Bickley v. Hayes*, 506.

Equity; Pleading; Bill.—While rule 10 of Chancery Practice provides that bills shall not contain blanks a bill will not be stricken because the year of the death of the predecessor in title of complainants was left blank; the bill showing that the exact date of her death was immaterial.—*Bell v. Burkhalter*, 527.

Equity; Bill; Formal Decree.—Where the contents of the omitted exhibit did not go to the essential equity of the bill, such omission did not render the bill demurrable, although a blank in a bill at a place where an exhibit was called for would have justified the granting of a motion to take the bill off the file.—*U. S. F. & G. Co. v. Pittman*, 602.

1½. Multifariousness.

Equity; Bill; Multifariousness.—A bill by judgment creditor seeking as the sole relief the annulment of a conveyance by a judgment debtor upon the sole ground that it was made to hinder, delay

EQUITY.—Continued.

or defraud creditors, was not multifarious, although it contained alternative allegations as to the consideration of the conveyance, as these allegations were mere specifications of the evidence in support of the charge of fraud, and did not destroy the singleness of the bill.—*Leonard v. B. F. Roden Gro. Co.*, 578.

2. Cross Bill and Incidents.

Equity; Pleading; Cross Bill.—Cross bills may be divided into two classes; first, those which are merely defensive, including those alleging facts merely to aid in the complete determination of the matter in controversy; and second, those praying for affirmative relief against a complainant, or a co-defendant, or other necessary parties.—*Bell v. McLaughlin*, 548.

Same; Dismissal of Bill; Effect on Cross Bill.—While the general rule is that the dismissal of a bill carries the cross bill with it, if the cross bill shows ground for equitable relief arising out of the subject matter of the original bill which will sustain the court's jurisdiction independent of the original bill, the dismissal of the original bill will not carry the cross bill with it.—*Ib.* 548.

Same; Cross Bill.—A cross bill has some of the characteristics of a separate suit, and yet it is not a distinct suit, since such cross complainant may be eliminated as a defendant by amending the original bill, and because of the provisions of section 3118, Code 1907, obviating the necessity of issuing summons to a party complainant in the original bill.—*Ib.* 548.

Same; Removal of Cloud; Waiver.—Although it would have been a good ground of demurrer, the failure to demur to a cross bill to remove a cloud upon title because of the allegation that the instrument creating the cloud was void on its face, was a waiver of that objection to the cross bill.—*Ib.* 548.

Same; Dismissal; Cross Bill.—Although the original bill was bad for want of a jurisdictional allegation, its dismissal did not carry the cross bill to cancel an instrument as a cloud upon title where the cross bill sufficient to sustain the court's jurisdiction.—*Ib.* 548.

EVIDENCE.

In particular actions and crimes, see that title; see Witnesses; Trial.

1. Incriminating Another.

Evidence; Incriminating Another.—Evidence for the purpose of incriminating another than defendant must relate to the res gestæ of the transaction, and must not be of conduct, declarations or admissions of the party on whom it is attempted to cast suspicion as the guilty agent.—*Tennison v. The State*, 1.

2. Purpose.

Evidence; Purpose.—Where evidence is admissible for a proper purpose, it cannot be excluded on the ground that it was susceptible of being used to the prejudice of defendant; his remedy being to instruct the jury as to its legitimate purpose.—*Smith v. The State*, 10.

3. Suppressing Truth.

Evidence; Attempt to Suppress Truth.—Evidence that a defendant requested a witness "not to tell anything, and that he could have what he wanted," was admissible as tending to show an effort to suppress the truth; the defendant having a right to give the statement an innocent meaning if he could do so.—*Smith v. The State*, 10.

EVIDENCE—Continued.**3½. Judicial Knowledge.**

Evidence; Judicial Knowledge.—The courts cannot judicially know whether or not the consent of the inhabitants of a certain township to the sale or lease of school lands had been ascertained or given since the admission of the state, under any of the various statutes governing such lease or sales.—*State v. Board School Com.*, 551.

4. Expert and Opinion.

Evidence; Experts; Subjects of Inquiry.—Whether the inner lining of the skull could be fractured without fracturing the outer lining thereof, was a proper subject for expert testimony.—*Robinson v. The State*, 43.

Same.—A witness who had been a practicing physician for twenty-four years, and shown to be otherwise qualified to testify, was competent to give his opinion whether the inner lining of the skull might be fractured, without fracturing the outer lining.—*Id.* 43.

Evidence; Opinion Evidence.—Witnesses who had never constructed hydraulic presses like one alleged to be defective, but who were master mechanics of many years' experience, and familiar with hydraulic presses and machines, and with the general construction and repair of such machines as well as with making and plugging holes, were qualified to give their opinion whether the press in question was defective.—*Caldwell-W. F. & M. Co. v. Watson*, 328.

Evidence; Opinion Evidence.—While one made sick by eating spoiled oysters may testify as to his symptoms after eating them, he cannot properly testify as to the cause of such symptoms, that being a question for the jury to determine.—*Travis v. L. & N. R. R. Co.*, 415.

Same; Opinion.—While a medical witness testified that spoiled oysters being eaten might have or could have produced plaintiff's sickness, it was not proper for him to testify that the sickness was caused from eating spoiled oysters, as that was for the jury to determine.—*Id.* 415.

Same; Expert; Common Knowledge.—Where a witness had testified that spoiled oysters could be detected by casual examination, further evidence by him that the proper thing to do when taking oysters to prepare them for food, is to examine them one by one before serving, was a matter of common knowledge, and not the subject of opinion evidence.—*Id.* 415.

5. At Former Trial.

Evidence; At Former Trial; Absent Witness.—Inability to find a witness and produce him at the trial is a sufficient predicate for the admission of his testimony given at a former trial, although it is not affirmatively shown that he is dead, insane or out of the jurisdiction of the court.—*Pope v. The State*, 61.

Same.—The predicate examined and held sufficient to show that a witness could not be found by the exercise of due diligence and hence, sufficient as a predicate for the introduction of his evidence, given on a former trial.—*Id.* 61.

Same.—Where there is no evidence that the witness ever resided or remained in any other county than that of the county of the trial, and that a subpoena to any other county would procure his attendance, due diligence does not require the issuance of subpoenas to other counties.—*Id.* 61.

EVIDENCE—*Continued.*

6. Flight.

Evidence; Flight.—In a criminal prosecution the state may always show flight of defendant, such as by showing that he absented himself from the community of the crime, as tending to show his sense of guilt, fear of arrest, or to avoid arrest.—*Goforth v. The State*, 66.

Same; Attending Circumstances.—Where the state has offered evidence showing flight of defendant, either the state or defendant may show the circumstances attending it as shedding light on defendant's motive in leaving the community.—*Ib.* 66.

Same.—While a defendant cannot introduce self-serving declarations as to his connection with the crime for the purpose of showing his motive in leaving the community, he may show his act and words which are so connected with the flight as to give character to it.—*Ib.* 66.

Same.—Where the state has shown the flight of defendant, and facts and circumstances tending to show that he was trying to conceal his movements, it was competent for defendant to introduce the contents of two post cards written by him to his mother in which he stated where he was going and what he intended to do, although the cards were admitted for the purpose merely of showing that he had written to his mother.—*Ib.* 66.

7. Conclusions.

Evidence; Conclusion.—Whether a person does or does not know a particular fact is a mere conclusion, and a witness should not be permitted to state whether another person does or does not know a fact.—*L. & N. R. R. Co. v. Williams*, 138.

Same.—Where a witness was in a position to observe, he may be able to state that another person present saw certain conditions which were visible; hence, where a party was injured in crossing a spur track of defendant railroad a witness may state that the conductor in charge of the train saw persons crossing and recrossing the tracks, as such is a collective statement of fact and not a conclusion.—*Ib.* 138.

8. Hearsay.

Evidence; Hearsay.—Where the action was by a married woman accompanied by her husband, seeking damages for being carried beyond her destination, the testimony of the husband that when he found the flagman a few minutes after the train had started from the station of destination, he asked such flagman why he did not stop long enough for them to get off, and that the flagman replied that he did, and did not have time to back the train, was a hearsay narrative and inadmissible.—*L. & N. R. R. Co. v. Cornett*, 203.

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators; Accounting; Agreement by Heirs; Construction.—Where an agreement between heirs provided that the administrator should make a final settlement without taking account of the lands formerly belonging to the estate, nor of the rents due therefrom except for two specified years, and no account of the debts charged upon that land; further providing that the administrator should charge each heir with the amount of rents received by him, and credit himself with the amount disbursed from moneys received from the estate otherwise than the proceeds of the land, but

EXECUTORS AND ADMINISTRATORS—Continued.

that no debt due from anyone of the heirs to the estate should be charged against any of the interest which the heirs might have in the assets of the estate, and providing for a voluntary partition of the land, and that the amount found due from each heir on the settlement of the estate should constitute a lien on the land set apart to such heir; the plain terms of the first two paragraphs will be construed to relieve the administrator as such of any obligation in respect to the individual indebtedness of the heir, and to prevent a setting up of such indebtedness as against the distributive share in the other property, aside from the land, but not to extinguish the lien against the land, in order to give effect to the plain terms of the last paragraph of the agreement.—*Caldwell v. Caldwell*, 590.

EXPLOSIVES.

See Trespass, § 1; Adjoining Land Owners.

Explosives; Blasting; Injury.—Where a plaintiff is lawfully on defendant's premises, and is injured by blasting, defendant's liability depends upon some proximate negligence on his part.—*Ex parte B'ham Realty Co.*, 444.

Same; Complaint.—A count which charged that the servants of defendant, acting within the line and scope of their authority, and knowing that the blasting would frighten and endanger the plaintiff and his family, and damage plaintiff's property by casting stones thereon, wantonly caused rocks and stones to be cast upon plaintiff's premises, sufficiently charged a trespass in an action for injuries by blasting.—*Ib.* 444.

Same; Damages; Jury Question.—Although a plaintiff in an action for trespass by blasting fails to prove aggravation entitling him to such damages, yet if plaintiff was entitled to recover, he would still be entitled to compensatory or nominal damages, and hence, defendant was not entitled to have the verdict directed for him.—*Ib.* 444.

FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.**1. False Imprisonment.**

False Imprisonment; Elements; Malice.—Malice is not an essential element of false imprisonment.—*Murphy v. McAdory*, 209.

Same; Pleading; Malice.—Where a complaint in an action for false imprisonment alleged the unnecessary fact that the act was done maliciously, malice must be proven.—*Ib.* 209.

FLIGHT.

See Evidence, § 6.

FOODS.**1. Sale of Stale or Tainted.**

Food; Sale of Spoiled Food; Negligence.—A railroad company would not be liable under section 7074, Code 1907, to one made sick by serving spoiled oysters in a dining car, if neither it nor its servants were negligent with respect to serving the oysters.—*Travis v. L. & N. R. R. Co.*, 415.

Same; Care Required.—A keeper of a restaurant or hotel serving customers meals, must exercise the same degree of care in selecting and preparing food which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would

FOODS—Continued.

be expected to exercise in preparing food for his own private table, and is liable for injury to customers in failing to do so.—*Ib.* 415.

Same; Burden of Proof.—One suing a railroad for damages suffered from sickness caused from eating oysters in one of its dining cars, has the burden of showing to the reasonable satisfaction of the jury that he was served with spoiled food through defendant's negligence.—*Ib.* 415.

Same; Instructions.—Where the evidence showed that the oysters were purchased about twelve hours before they were served, and there was also evidence that a reasonably prudent person engaged in that business would have examined the oysters before serving them to ascertain if they were apparently fresh and wholesome when cooked, a charge that if defendant and its agents exercised ordinary care in selecting, purchasing and keeping the oysters which were served to plaintiff, they should find for defendant, ignored the duty of defendant to inspect the oysters before serving and was consequently erroneous.—*Ib.* 415.

Same.—A charge asserting that if defendant exercised ordinary care in selecting and keeping the oysters, plaintiff could not recover, though he was served with a spoiled oyster, was calculated to mislead because neglecting to define the character of the ordinary care required of a restaurant keeper.—*Id.* 415.

Same.—Where the court instructed that defendant was not a guarantor of the soundness of every oyster furnished, and if it exercised ordinary care in selecting, keeping and preserving its oysters, including those furnished plaintiff, and did not knowingly furnish plaintiff with unwholesome oysters, the jury should find for defendant; also that the burden was on plaintiff to show negligence on the part of defendant or its employees in selecting the oysters, and that if the oysters served plaintiff were from a reputable dealer in bulk, in the usual course of such dealings, and were in an apparent fresh, safe and sound condition, so far as defendant could discover by inspection, defendant was not guilty of negligence in serving the oysters cooked as ordered by plaintiff, and taken from the bulk, such instructions were calculated to mislead, and should not have been given.—*Ib.* 415.

Same.—A charge asserting that if defendant inspected the oysters through its chief cook or chef before they were fried and served to plaintiff, and that if they were then wholesome and fresh, defendant discharged its duty to plaintiff, was misleading in the use of the word "before" where the word "when" should have been used.—*Ib.* 415.

Same; Evidence.—The fact that the sight of an oyster causes plaintiff unpleasantness is not evidence tending to show that the oysters he ate, the basis of the action for damages for serving unwholesome oysters, were the cause of his sickness.—*Ib.* 415.

FRAUD; STATUTE OF.

Frauds; Statute of; Guaranty.—Where a guaranty against the default or miscarriage of another is executed before the delivery of the contract guaranteed, the consideration for the principal contract is sufficient to support the guaranty, and it is not within the statute of frauds; but if the guaranty is executed after the delivery of the principal contract, it is void under the statute of frauds unless the guaranty is itself supported by a distinct consideration expressed therein.—*Dilworth v. Holmes F. & V. Co.*, 608.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyance; Bill; Knowledge of Grantee.—In a suit to set aside a fraudulent conveyance, a bill alleging that the grantee shared in or had notice of the grantor's fraudulent purpose, or had knowledge of facts sufficient to inform her of such purpose if diligently followed up by her, sufficiently charges wrongful conduct on her part to avoid the conveyance.—*Leonard v. B. F. Roden Gro. Co.*, 578.

GUARDIAN AND WARD.

Guardian and Ward; Sureties; Conclusiveness of Adjudication Against Guardian.—A settlement in the probate court by the administrator of a deceased guardian was res inter alios acta as to the sureties of the guardian, and the decree was not binding thereon.—*U. S. F. & G. Co. v. Pittman*, 602.

Same; Liability of Surety.—After the death of the guardian the liability of his surety can be determined only by bill in equity.—*Id.* 602.

Same.—Where the decree in the probate court on the settlement of an administrator of a deceased guardian was nearly fruitless because of the insolvency of the guardian, a bill in equity could be maintained against the guardian's sureties.—*Id.* 602.

Same; Parties.—The personal representative of a deceased guardian was a necessary party to a bill in equity against the surety of the guardian to determine the liability of the surety.—*Id.* 602.

Same.—On the bill and answer in this case complainants were entitled to an accounting, since a fiduciary relation appeared which involved the duty to account, and while, as a general rule, when a case is submitted on an unsworn bill and answer without testimony, and the answer is a responsive denial of all of the grounds of equity stated in the bill, it prevailed against the bill, where material matters are stated in the bill which prima facie are within the knowledge or information of respondent and the answer fails to deny them, or express a belief in their falsity or to state that respondent cannot form any belief respecting their truth they must be considered as admitted; in such circumstances a general denial or mere demand for proof is not a sufficient denial.—*Id.* 602.

HIGHWAYS.

1. State Aid to.

Highways; State Commission; Statute; Construction.—Acts 1911, p. 223, is entitled to a liberal construction so as to give effect to the purposes of the legislature to afford state aid and supervision in the construction and maintenance of roads which received State aid.—*Spraggins, et al. v. State, ex rel. Jefferson Co.*, 663.

Same; State Aid for County Roads.—Under section 6, Acts 1911, p. 223, no county is entitled to receive from the state more than one-half of the cost of any road.—*Id.* 663.

Same.—Under sections 9 and 10 of said Act, if the money is not actually expended or the work actually performed within the time prescribed a mere contract for the work to be done will not constitute a use of the money within the time limited, unless said contract and contractor's bond for a road actually begun were approved by the Commission with the understanding that the contract should constitute a use of the money agreed to be paid thereunder.—*Id.* 663.

Same; Rules and Regulations.—Where a county entered into a contract late in 1912, for the construction of a road, and the contractor's bond was approved by the State Highway Commission, but

HIGHWAYS—Continued.

approved only for the expenditure of the 1912 apportionment, the limitation imposed by the Commission was reasonable, and was a valid exercise of the power to make rules and regulations conferred upon it by Acts 1911, p. 223.—*Ib.* 663.

Same.—The facts examined and it is held that the county was entitled to one-half of the money expended in 1912 from the apportionment made to it in 1911, all of the 1912 apportionment and the balance of one-half of the total cost from the 1913 apportionment.—*Ib.* 663.

HOMICIDE.**1. Evidence.**

Homicide Threats; Evidence.—Although of slight probative force, a statement made by a defendant to a deceased, made about a week prior to the killing, that deceased had better not appear against defendant in court, was in the nature of threats, and admissible as such.—*Tennison v. The State*, 1.

Homicide; Evidence.—Evidence as to the caliber of the revolver by which deceased was shot was not relevant or material on the question whether defendant or deceased fired the first shot.—*Smith v. The State*, 10.

Same.—The evidence examined and it is held to be a question for the jury whether deceased saw defendant's gun when they went out together.—*Ib.* 10.

Same; Threats.—As threats may be made by words which are meaningless unless explained, and the fact that a threat is coupled with a condition, merely affects its weight as evidence, and not its admissibility, the rule that the circumstances connected with threats made previous to the killing are not admissible, is subject to exceptions; hence, the state may show the meaning of a condition attached to a threat where its meaning does not appear on the face of the threat.—*Ib.* 10.

Same; Dying Declarations.—The exclamation by deceased "boys, he has killed me!" made while he was lying on the floor after being helped into the room immediately after he was shot, where he died within a few minutes, was admissible as the wound was mortal, and the circumstances showed that deceased realized his impending dissolution when he made the exclamation.—*Ib.* 10.

Same; Res Gestæ.—Where a son of deceased came into the room where the body of deceased lay, about ten minutes after deceased had died, and asked, while crying, "Is my papa dead?" the reply of defendant, "Yes, old Pat is dead, Son," was not admissible as a part of the *res gestæ*.—*Ib.* 10.

Same; Hostility.—The evidence as stated above became admissible as tending to show hostility at the time of the statement, and hence, to authorize an inference of hostility at the time of the killing where it further appeared that defendant repeated the statement three times, each time raising his voice as he did so.—*Ib.* 10.

Same.—Evidence of subsequent hostility by defendant is admissible provided the time between its expression and the time of the killing is not too distant; it being for the trial judge to determine whether the intervening time is too long to permit an inference of hostility at the time of the killing.—*Ib.* 10.

Same; Clothing.—The clothing worn by deceased showing the location of the wound is admissible in evidence.—*Ib.* 10.

Same.—Where defendant appeared at the trial with one leg gone, having lost it previous to the homicide, it was competent to show that at the time of the homicide he was going about on two legs,

HOMICIDE—Continued.

one of which was wooden; it being for defendant to explain the circumstances if he thought the evidence admitted prejudicial to him.—*Ib.* 10.

Homicide; Evidence; Motive.—Where there was evidence that defendant had threatened to kill deceased because deceased had reported him for violating the prohibition law, the affidavit charging defendant with the violation of that law, signed by deceased, was admissible in evidence, as tending to show motive.—*Hays v. The State*, 76.

2. Instructions.**(a) Self-Defense.**

Same; Self-Defense.—If defendant brought on the difficulty, the manner of his invitation to deceased to come around the corner, etc., would not excuse him from bringing it on; hence, a charge predicating the right of self-defense on the peaceable manner in which defendant asked deceased to come around the corner, was properly refused.—*Smith v. The State*, 10.

Same.—A charge of self-defense which is defective because premitting defendant's belief that he was in peril at the time of the killing, was properly refused.—*Ib.* 10.

Same; Duty to Retreat.—Where a defendant is free from fault in bringing on a difficulty he is under no duty to retreat unless he can do so with reasonable safety and without increasing his danger.—*Ib.* 10.

Same.—Charge 10 examined and it is held that while the latter part of the charge was defective for not clearly stating the necessity of defendant's freedom from fault as a condition to his right not to retreat, yet when construed with the first part of the charge, this deficiency is supplied, and that the instruction as a whole was correct, and should have been given, under the evidence in this case.—*Ib.* 10.

Same; Self-Defense.—The burden is on defendant to show a necessity, real or apparent, to take life, unless the evidence which proves the homicide also shows the excuse or justification; when, therefore, a defendant has established such necessity without an opportunity to retreat safely, the burden is on the state to show that defendant was at fault in bringing on the difficulty.—*Robinson v. The State*, 43.

Homicide; Self-Defense; Duty to Retreat.—Where the evidence was in conflict as to whether defendant was in danger at the time of the killing, the refusal to charge that if defendant was free from fault in bringing on the difficulty, he was under no duty to retreat unless he could have retreated without increasing his danger, or with reasonable safety, was error to reversal.—*Ex parte Johnson*, 88.

(b) Degree.

Homicide; Instructions; Degree.—A charge asserting that if the jury was reasonably doubtful as to the proof of any material allegation of the indictment, they must acquit, was misleading in a homicide case, as the offense charged included every minor offense of which defendant might be convicted.—*Smith v. The State*, 10.

Same; Element of Offense.—In order for a homicide to be a murder it must have been committed with malice aforethought.—*Robinson v. The State*, 43.

Same; Burden of Proof.—Malice being an essential element of murder, and the presumption of innocence including freedom from malice as well as innocence of the act causing death, proof of homicide alone does not necessarily establish that he who caused the death

HOMICIDE.—Continued.

was guilty thereof, since the killing may have been either murder or manslaughter, or excusable or justifiable homicide.—*Ib.* 43.

(c) Generally.

Homicide; Instructions.—An instruction that mercy and sentiment did not rest with the jury, was neither improper nor erroneous in a homicide case.—*Robinson v. The State*, 43.

Same; Evidence.—Where defendant was being tried for murder in the second degree, evidence that defendant had encouraged a son of the deceased to kill his father, was admissible as the court was without power to exclude it because it was unnatural or unreasonable.—*Ib.* 43.

Same; Relation of Parties.—Evidence that deceased was a witness against defendant in a cause then pending, and that defendant knew such fact at the time he killed deceased, was both relevant and competent.—*Ib.* 43.

3. By Life Convict.

Convicts; Life; Statute; Construction.—Under section 7089, Code 1907, a person convicted of murder in the first degree and sentenced to be hanged, which sentence was commuted by the Governor to life imprisonment, is a "convict sentenced to imprisonment for life," since the commutation simply substituted a less for a greater punishment, and the judgment had the same legal effect after commutation, as if the jury had fixed his punishment at life imprisonment instead of death.—*Johnson v. The State*, 79.

Same.—In a prosecution of a convict for murder after the introduction of a copy of the judgment sentencing defendant to death, it was proper to admit in evidence the statement of commutation of punishment to life imprisonment.—*Ib.* 79.

Same; Failure to Record.—The failure of the circuit clerk to record the statement of commutation, as is required by section 7513, Code 1907, did not affect its legality, validity, or admissibility in evidence.—*Ib.* 79.

Homicide; Indictment; Charging Instrument.—An indictment properly charging murder by means of a certain instrumentality is sufficient if it specifies the instrumentality by its generally accepted name; hence, an indictment charging that defendant killed deceased with a pick is sufficient, although it does not specify the particular kind of pick.—*Ib.* 79.

Same; Evidence.—Where the prosecution was of a convict for the murder of another convict, it was competent for a convict witness to state that as he ran by the defendant the defendant asked him where he was going, that he replied that he was going to tell the Cap'n about the killing of Josh, and that the defendant said: "If you go down and tell him, I will kill you when you come back," as it was part of the res gestæ, and occurred while defendant was still in the act of murder. Such statements were also admissible as illustrating the frame of mind of defendant at the time of the homicide, and as tending to show that he knew he was not acting in self-defense.—*Ib.* 79.

Same; Opinion Evidence.—Where the theory of the state was that deceased became overcome by powder smoke in a mine, and laid down, and upon his refusal to get up when defendant ordered him to do so, defendant killed him with a pick, it was harmless error to permit a witness to state that the smoke in the mine was powder smoke as it was immaterial what kind of smoke overcame the deceased.—*Ib.* 79.

HOMICIDE—Continued.

Same.—In a prosecution under section 7089, Code 1907, the fact that it was necessary, in order for the state to show that defendant was a life convict, to first show that he was convicted and sentenced to death, followed by commutation to life imprisonment, could not have been prejudicial to defendant, as the fact that the sentence was commuted tended to show that the crime was attended by palliating circumstances.—*Ib.* 79.

Evidence; Convicts; Weight.—Although as a general rule, the testimony of convicts is not regarded as being reliable, yet such testimony will authorize and sustain a conviction for crime of the highest magnitude, although uncorroborated.—*Ib.* 79.

HOMESTEAD.

Homestead; Exemptions; Conveyance; Right to Raise Objection.—No one but the husband or wife in whose interest a homestead exemption is declared by positive law, or those standing in privity with them in regard to the homestead, or having a valid lien thereon, can question the effect of a transfer of the property subject to the homestead right by the husband or wife without a joinder of the other.—*Reid v. Allen*, 582.

Same; General Creditors.—Those without a valid lien on the subject of conveyance—that is general creditors—cannot question the irregularity of the conveyance of a homestead arising by reason of the fact that the debtor's wife did not join in the conveyance.—*Ib.* 582.

Same; Conveyance by Husband; Validity.—A conveyance of the subject of a homestead right by a husband alone is not void, but voidable, and that only at the instance of one having a right to have the conveyance pronounced void.—*Ib.* 582.

INDEPENDENT CONTRACTOR.

See Master and Servant, § 2.

INFANTS.

1. Right to Sue.

Infants; Right to Maintain Action; Waiver of Objection.—Where the action was instituted in the name of the infant without the intervention of a guardian or next friend, and pending the litigation, the infant arrived at the age of majority and thereafter, by his conduct in the cause, manifests an adoption or ratification of the action so commenced, the objection cannot be made that he was an infant when the action was begun.—*Bell v. Burkhalter*, 527.

Same; Married Women; Disabilities.—Under the provisions of section 4499, Code 1907, an allegation that an infant plaintiff at the age of eighteen years was married in this state, sufficiently shows her right to maintain the action without the interposition of a guardian or next friend.—*Ib.* 527.

INTERROGATORIES.

See Discovery.

JEOPARDY.

Former Jeopardy; Acquittal of Higher Degree.—A conviction of a lesser degree of crime than that charged in the indictment is an acquittal of a charge of any higherer degree of the same offense, although the judgment of conviction of the lesser degree is reversed on appeal.—*Robinson v. The State*, 43.

JEOPARDY—*Continued.*

Same; Failure to Plead; Waiver.—To be available the defense of former jeopardy must be specially pleaded, and unless so pleaded, a defendant is held to have waived his right thereto.—*Id.* 43.

JUDGMENTS.

1. Conclusiveness and Res Judicata.

Judgment; Conclusiveness; Persons Bound.—The judgment in an action by a third person for damages for the maintenance of a nuisance was not res judicata that the thing complained of was a nuisance, and was hence, properly excluded from the evidence.—*Jones v. Adler*, 435.

Same.—A judgment in rem is binding and conclusive upon all the world as to the status of the thing on the theory that the thing is in possession of the court, and that it is the thing itself which is in litigation.—*Id.* 435.

Same; Res Judicata.—The rule of res judicata.—former recovery—is confined to suits where the parties and the subject matter are the same, and the identical point is in issue, and judgment has been rendered on that point.—*Id.* 435.

JURY AND JURORS.

1. Venire in Capital Cases.

Jury; Venire; Service on Accused.—A special venire in a murder case will not be quashed merely because in making out the copy to be served on defendant, the clerk wrote the name of two jurors improperly.—*Edgar v. The State*, 36.

Same; Excusing Jurors.—Where a juror is excused by the court for good cause, it is not erroneous to fail to place the name of such a juror on the copy of the venire from which the jury is to be drawn.—*Id.* 36.

Same.—The provisions of section 32, Acts 1909, p. 317, are mandatory, and where a juror is not excused and is present in court, the court may not refuse to place his name on the jury list merely because of a clerical error of the clerk in copying his name in the copy of the venire to be served on the defendant.—*Id.* 36.

Jury; Special Venire; Rule of Court.—Under rule 30 of the circuit and inferior court practice, an entry reciting the appearance of the prosecutor and defendant in person and by attorney, and that defendant on arraignment pleaded former acquittal of murder in the first degree as an answer to the indictment, and that such plea was sustained, and defendant was put on trial for murder in the second degree, was such a substantial compliance with the requirements of the rule as to avoid the necessity of a special venire for the subsequent trial.—*Robinson v. The State*, 43.

LICENSES.

Licenses; Motor Vehicles; Constitutionality.—Section 221, Constitution 1901, is intended to prevent discrimination against counties and municipalities by the levy of one tax for the sole benefit of the state to the exclusion of the counties and the municipalities, and such constitutional section is not violated by Acts 1911, p. 636, since the act expressly provides for the apportionment of the revenue thus raised between the state and the county, or incorporated town or city upon a basis of forty and sixty per cent.—*Ex parte Bozeman*, 91.

LIMITATION OF ACTIONS.

Limitation of Action; Pleading; Avoidance.—Where the gravamen of a count for damages for a nuisance was the erection of a purification plant, a plea of the one year statute of limitations, was properly pleaded to such count, although the count alleged that plaintiff had been forced to inhale noxious odors during the year last passed, but did not allege the date of the erection of such plant.—*Jones v. Adler*, 435.

Limitation of Action; Enforcement of Lien on Real Property.—Under the agreement in this case, where the other heirs sought a decree determining the amount each should be required to contribute to redeem the land from the mortgage, a cross bill by the administrator seeking to have the indebtedness of the heirs considered in determining the amount of such contribution, was the assertion of the lien upon the land created by the agreement, and not a right to recover upon the indebtedness, and was therefore not barred in less than twenty years from the time that amount of indebtedness was determined.—*Caldicell v. Caldicell*, 590.

MANDAMUS.

Mandamus; Interlocutory Order; Remedy.—In cases to compel the vacation of an interlocutory order in a divorce proceedings, mandamus serves the purpose of an emergency appeal, and appellant may have what relief he shows himself entitled to, though, in his application, for the writ he seeks more than he is entitled to.—*Ex parte Edwards*, 659.

MASTER AND SERVANT.

1. Injury to Servant.

(a) Complaint.

Master and Servant; Injury to Servant; Complaint.—The complaint examined and each count held to sufficiently state a cause of action under subdivision 1, section 3910, Code 1907.—*Warrior-Pratt C. Co. v. Shereda*, 118.

Master and Servant; Injury to Servant; Complaint.—In a personal injury action by a servant, a complaint which merely alleges the injury and that it was caused by the negligence of the superintendent of the master, is not sufficient, although following the language of the statute, (subdivision 2, section 3910, Code 1907); the field of superintendence is a wide one, covering all of the master's business, and the mere allegation that the negligence of the superintendent caused the injury was not sufficient to give the master notice of the negligence charged.—*Cahaba Coal Co. v. Elliott*, 298.

Master and Servant; Injury to Servant; Complaint.—A complaint brought under an Employer's Liability Act should conform to the general rules of pleading in matters of certainty.—*Woodward Iron Co. v. Marbut*, 310.

Same.—A complaint brought under the Employer's Liability Act, which merely alleges the injury and that it was caused by the negligence of the superintendent of the master is not sufficient, although it follows the language of subdivision 2, section 3910, Code 1907; the field of superintendence is a wide one, covering generally the master's business, and the mere allegation of the negligence of the superintendent does not give the master sufficient notice as to the matters charged.—*Id.* 310.

MASTER AND SERVANT—*Continued.*

(b) Instructions.

Same; Instructions.—Where plaintiff alleged that he was in the mine owner's employment but the evidence showed that he was an independent contractor, an instruction authorizing a recovery under the conditions which would render the master liable to a servant should not have been given, as under the complaint plaintiff could not recover unless he was shown to be a servant.—*Warrior-P. C. Co. v. Shereda*, 118.

(c) Evidence.

Same; Evidence.—In an action for injuries sustained while engaged in mining coal for a certain sum per ton, and the superintendent of the mine owner had testified that he had made the usual contract with plaintiff to drive a room in the mine, such superintendent should have been permitted to testify as to the nature and character of the contract.—*Warrior-P. C. Co. v. Shereda*, 118.

Same.—Where the testimony was conflicting whether the rock which struck plaintiff fell from the roof of the entry where the evidence tended to show that it was defendant's duty to inspect and remove dangerous rock or coal, or fell from the roof of the room in which plaintiff was working where the evidence tended to show that it was his duty to inspect or remove dangerous rock or coal, the court should have admitted all evidence calculated to show the respective duties of the mine owners and the miner, with respect to inspection or removal of coal and rocks.—*Ib.* 118.

Same; Expert Evidence.—Whether an entry was driven in a mine with due care and skill, was a proper subject for expert testimony.—*Ib.* 118.

Same; Sufficiency of Evidence.—An allusion in the testimony of a witness to the presence of a person representing an insurance company, and his testimony that he sent into the mine and brought out the men who knew about the accident was not sufficient to show that the mine owner had insured itself against liability for injuries to plaintiff, or to make a question for the jury as to the existence of the relation of master and servant between the mine owner and plaintiff, where it was not shown by whom the insurance referred to was effected.—*Ib.* 118.

Master and Servant; Injury to Servant; Sufficiency of Evidence.—In an action for injuries to a servant, where there was no evidence to show that the injury was caused by defective appliances furnished by the master as charged, except the fact that the accident happened, and the inference was just as reasonable that it was caused by plaintiff's negligence, or that it was the result of an inevitable accident occurring without the negligence of anyone, the employee was not entitled to recover.—*Amer. C. I. P. Co. v. Landrum*, 132.

Same; Burden of Proof.—Negligence on the part of the master cannot be inferred from the mere fact that an injury happened to an employee and the burden is on the injured employee of showing negligence of the master as an affirmative fact, and he does not sustain such burden by showing that the employer may have been negligent.—*Ib.* 132.

Same; Question for Jury.—Where the testimony shows that any one of several things may have been responsible for the injury, for some of which the employer is responsible, and for some of which he is not, the jury should not be permitted to guess as to the real cause

MASTER AND SERVANT—Continued.

of the injury when there is no satisfactory foundation in the testimony for that conclusion.—*Ib.* 132.

Same; Evidence; Sufficiency.—The evidence examined, and held insufficient to charge the master with negligence, either in superintendence or in furnishing defective appliances.—*Woodward Iron Co. v. Marbut*, 310.

(d) Making Safe Place.

Master and Servant; Injury to Servant; Employee Engaged in Making Safe Place.—Where a mine employee was injured by the fall of loose rock while he was engaged in clearing the hallway of such rock so as to make it safe for the use of other employees, and before knocking a prop from under such rock, which resulted in the rock falling, he sounded the roof, but it gave no evidence of being loose or otherwise unsafe, the master was not liable for the injuries, notwithstanding it was the duty of the bank boss to examine and see that the roofs of hallways were in reasonably safe condition; if the rock was loose it was the duty of the injured employee to have discovered it, and if it was not loose the bank boss was not negligent.—*Adams v. Corona C. & I. Co.*, 127.

(c) Contributory Negligence.

Same; Contributory Negligence.—Where it was the duty of an employee to adjust the pins in a clevis by means of which a core used in hoisting was attached to the hoisting apparatus, he could not recover for injuries caused by the core falling due to his own failure to properly insert the pin.—*Amer. C. I. P. Co. v. Landrum*, 132.

(f) Duty of Master.

Same; Duty of Master.—A servant is expected to exercise some degree of intelligence, and the instinct of self-preservation, and is held to assume all injuries connected with his employment against which he may protect himself by the exercise of ordinary care.—*Woodward Iron Co. v. Marbut*, 310.

(g) Defective Appliances and Incidents.

Master and Servant; Injury to Servant; Pleading.—A plea setting up that the injured servant knew of the defect complained of, but did not inform the master within a reasonable time states a good defense under section 3910, Code 1907; the fact that the master knew of the defects, being an exception, was matter to be set up by replication.—*Sloss-S. S. & I. Co. v. Webster*, 322.

Master and Servant; Injury to Servant; Defect in Machinery; Jury Question.—Under the evidence in this case it was a question for the jury whether there was a defect in the machinery of the master which is alleged to have caused the injury to the servant.—*Caldwell-W. F. & M. Co. v. Watson*, 326.

Same; Defect in Machinery.—Under subdivision 1, section 3910, Code 1907, an instrumentality used in the business of the master not in proper condition for the purpose for which it is applied is defective, although each part may be sufficient.—*Ib.* 326.

Same; Burden of Proof.—In an action for injury to servant because of defects in the ways, works, etc., the burden is on plaintiff not only to show the existence of the alleged defect, and that it was the proximate cause of the injury, but that the defects arose from or had not been discovered or remedied owing to the negligence of the master, or of some person in his service; where, however, the defect

MASTER AND SERVANT.—Continued.

is shown to be structural, and such as renders it unsafe, it may be inferred that the master was aware of it, especially where the machine was constructed by him.—*Id.* 326.

Same; Care Required.—The law does not require a master to use the best possible appliances, and he may show that they were such as were adopted and used by prudent persons in the same business; this fact is not conclusive, however, that the machine is not defective, and does not necessarily relieve the master from liability.—*Id.* 326.

Same; Evidence; Defect.—Where there was evidence that the machinery used in the master's business was unsafe or insufficient, proof that such machines were generally used by prudent persons in the same business was admissible, to rebut negligence.—*Id.* 326.

Same; Instructions.—A charge asserting that even if the hydraulic press mentioned in the complaint was defective, plaintiff could not recover unless such defect could have been discovered by such an inspection, as an ordinarily prudent person engaged in the same business would have given it, and unless defendant was negligent in failing to make such inspection, pretermitted the fact that the press was constructed by the defendant, thus charging him with notice of inherent defects not discoverable upon ordinary inspection, and was hence, properly refused.—*Id.* 326.

Same.—A charge that if defendant's hydraulic press built by him was built according to the plan of similar presses sold by reputable dealers, and used by persons engaged in similar business, and if defendant had no knowledge of any defect therein, plaintiff could not recover, was properly refused as the law charged defendant with notice of any defect in the press.—*Id.* 326.

Same.—A charge asserting that if the master was guilty of no negligence in the manufacture of the hydraulic press, plaintiff could not recover, was properly refused, as the press may have been actually made in the most skillful manner, and yet have been unsafe for the purposes for which it was made.—*Id.* 326.

Same; Jury Question.—The question of defendant's negligence in furnishing the press was for the jury, there being evidence that it was defective, although there was evidence that other well regulated plants used the same kind of hydraulic pressure, and undisputed evidence that the press had never before caused an accident, although operated for years.—*Id.* 326.

(h) Assumption of Risk.

Master and Servant; Injury to Servant; Liability.—Where a locomotive engineer while operating his engine at night discovered another engine, with headlight burning, about 40 yards ahead, which was on a spur track, but which he supposed to be on the main line, and that a collision was imminent, leaped from his engine, and was injured, he cannot recover for the injury resulting upon the theory that the company was negligent in failing to warn him of the spur track, or in leaving the engine on it so close to the main line as to deceive him, or in not screening or extinguishing the headlight or such engine, since it was stationed a safe distance from the main line.—*Stewart v. N. C. & St. L. Ry.*, 339.

Same; Assumption of Risk; Apparent Danger.—Under the facts in this case, the engineer must be held to have assumed the responsibility of determining for himself what he would do for his own safety where he misjudged ordinary and usual conditions which were not in fact at all dangerous.—*Id.* 339.

MASTER AND SERVANT—Continued.**2. Independent Contractor.**

Same; Independent Contractor.—One who is engaged to mine coal in another's mine, at a place fixed by the owner's superintendent, at a stated rate per ton, and who is not in any manner under the control of the mine owner or its representatives with respect to the details of the mining is not a servant, but is an independent contractor; hence, where the complaint alleged that plaintiff was in the employment of the mine owner, and the evidence showed that he was engaged to mine coal at a certain rate per ton; and did not show that the mine owner had any control or direction over him, such mine owner was entitled to have a verdict directed for him at the suit of plaintiff under the Employer's Liability Act.—*Warrior-P. C. Co. v. Shereda*, 118.

Same; Presumption and Burden of Proof.—Where the action was for injury sustained while engaged in mining coal in another's mine, there was no presumption that plaintiff was a servant rather than an independent contractor, and the burden was on plaintiff to show the existence of the relation of master and servant.—*Id.* 118.

3. Liability to Third Persons.

Master and Servant; Liability to Third Person; Trespass.—A master is liable for the trespasses of his servant which are the natural or probable result of his orders, or which he ratifies.—*Ex parte B'ham Realty Co.*, 444.

MORTGAGES.**1. Satisfaction; Effect of.**

Mortgages; Satisfaction.—In view of the provisions of section 4288, Code 1907, a verbal agreement that a chattel mortgage should continue as security, did not continue the mortgage as the chattel mortgage where it had been previously satisfied.—*Interstate L. Co. v. Duke*, 484.

2. Redemption from Foreclosure.

Mortgages; Foreclosure; Redemption.—Where an heir acquired an interest in lands of his ancestor subject to mortgage and adverse to his co-heirs, under such circumstances that the title thus acquired inured to the benefit of the co-heirs, a bill praying that the court apportion to each of the heirs the amount which each should contribute for the redemption of the land from the mortgage, with reference to a contract of partition between the heirs, is a bill to redeem the entire tract, and not objectionable as a bill to redeem a fractional part.—*Caldwell v. Caldwell*, 590.

Same; Real Property; Action Against Heirs; Cross Bill.—Where the action was by the other heirs to have the court determine the amount to be contributed by each to redeem the land from the mortgage, with interest, a cross bill by the administrator insisting that the lien be considered in determining that question, contains equity relative to the subject of the original bill, to prevent further litigation, and accounts will be stated between the heirs for the liens not exceeding the value of the land received by each under the contract of partition.—*Id.* 590.

3. Nature and Characteristics.

Mortgages; Nature of Instrument; Mortgage or Conditional Sale.—Although the instrument attempted, in the printed part thereof, to reserve title to the property in the mortgagee until the debt was paid, it was a chattel mortgage and not a conditional sale where it was

MORTGAGES—Continued.

denominated a mortgage, recognized a debt to be paid by a definite time, provided for foreclosure under power of sale and stipulated for authority in the mortgagee to purchase at the sale, provided for the payment of an attorney's fee for collecting the mortgage, and covered crops to be raised during the year 1911.—*Dilworth v. Holmes F. & V. Co.*, 608.

MUNICIPAL CORPORATIONS.

1. Special Street Assessment.

Municipal Corporations; Special Assessment; Railroad Property; Sale.—An assessment for street improvement against a small portion of the right of way of a railroad company, engaged in the discharge of its functions as public service corporation, as a going concern, cannot be enforced by a sale of that portion of the right of way.—*City of Decatur v. So. Ry. Co.*, 531.

NEGLIGENCE.

See Carriers; Railroads; Master and Servant.

1. Contributory Negligence.

Negligence; Contributory; Infant.—Where the action is for injury to a boy between seven and fourteen years of age, a plea of contributory negligence of such infant should take issue as to his age, or should allege facts which rebut his presumed incompetence, and failing to do so the plea is bad.—*C. of Ga. Ry. Co. v. Chambers*, 155.

Same; Rebuttable Presumption.—Where the action is for injury to a child under fourteen years of age, and the defense is contributory negligence of such child, the presumption of his mental incapacity is a rebuttable presumption.—*Ib.* 155.

Negligence; Contributory Negligence; Plea.—Pleas of contributory negligence are required to allege facts sufficient in themselves to show plaintiff's negligence as a legal conclusion, or to reasonably suggest it as an inference of fact, and in the last case, must color the equivocal facts by stating the conclusion that plaintiff's conduct was negligent.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same.—Where the conduct of plaintiff is not negligent per se, and yet may be so by reason of his surroundings, pleas setting up contributory negligence under such circumstances must allege those circumstances as far as reasonably practicable.—*Ib.* 273.

Negligence; Contributory Negligence; Children.—A child five years of age is not chargeable with contributory negligence.—*Sheffield Co. v. Harris*, 357.

2. Burden of Showing.

Negligence; Burden of Proof.—Where a plaintiff bases a right of recovery upon the negligence of another he must show a state of fact from which the negligence charged in his complaint may be reasonably inferred.—*Carlisle v. C. of Ga. Ry. Co.*, 195.

Same; Evidence; Sufficiency.—Where the evidence leaves it uncertain as to whether the cause of the injury was something for which defendant was responsible, or something for which it was not responsible, there is a failure of proof, and the jury cannot be permitted to guess at the real cause.—*Ib.* 195.

3. Pleading.

Negligence; Pleading; General Averments.—In an action for injury, a general averment of negligence is sufficient, if the facts stated

NEGLIGENCE—*Continued.*

show the existence of a duty on the part of defendant to act, arising out of the relation of the parties.—*W. Ry. of Ala. v. McGraw*, 220.

Negligence; Pleading.—Where a complaint seeks recovery for simple negligence, it should definitely state the facts out of which the duty to act springs; this being properly stated, the negligent failure to perform the duty may be alleged in general terms.—*So. Ry. Co. v. Hanby*, 255.

4. Ordinary Care.

Negligence; Ordinary Care.—Ordinary care is that care which ordinarily prudent persons exercise under the same or similar circumstances, and a want of that care is negligence.—*Travis v. L. & N. R. R. Co.*, 415.

5. Machinery Attractive to Child.

Negligence; Machinery Attractive to Children; Complaint.—A declaration which charged that defendant maintained on its premises machinery, which it negligently left open and unguarded, although it knew that plaintiff, who was a minor two years old, lived upon the premises, was continually playing about the machinery; that the machinery was of such a character as would attract a child of plaintiff's age, and as a proximate result of the negligence of defendant, plaintiff's arm was caught in the cogs of the engine, stated a cause of action for injury to such minor.—*Clover C. Co. v. Diehl*, 429.

Same; Imputed Negligence; Parent.—The contributory negligence of the father of a three year old child is not available as a defense to an action for injuries to the child caused by the negligence of defendant.—*Ib.* 429.

Same; Child of Servant.—One is liable for injuries to a three year old child caused by the negligence of the manager, even though the manager was the child's father, the child not being responsible for the negligence of its parent.—*Ib.* 429.

NEW TRIAL.

New Trial; Grounds; Misconduct of Counsel.—A new trial will be not granted because of improper remarks of counsel where the remarks are grossly improper and highly prejudicial, unless appropriate objection and appeal to the court for corrective action was made at the time of their utterance.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same.—The remarks considered and held not so grossly improper or highly prejudicial as to require a new trial where appropriate objections and appeal to the court for corrective action was not taken at the time.—*Ib.* 273.

Same; Procedure; Assignment of Grounds.—An assignment that certain improper remarks were made by a counsel without any allegation that they affected the jury and procured a verdict unfavorable to defendant, or excessive in amount, were insufficient as grounds for a motion for new trial.—*Ib.* 273.

New Trial; Grounds; Conduct of Juror and Party.—The fact that plaintiff boarded at the same place with two of the jurors, slept in the same room with them for several nights, and in the same bed with one of them, discloses such misconduct as to require the setting aside of the verdict and granting of a new trial, notwithstanding the association was not sought by either the plaintiff or the jurors, and that they had no improper motive, and testified that the trial

NEW TRIAL—Continued.

was not discussed between them, as the relation was so intimate as necessarily to have influenced the verdict.—*L. & N. R. R. Co. v. Turney*, 398.

Same.—Where the successful party has treated, fed or entertained a juror, a new trial will be awarded on the grounds of public policy without regard to the probable effect of such conduct upon the verdict; but in the absence of any evil intent by the parties, mere casual meetings and exchange of ordinary civilities will not vitiate the verdict.—*Ib.* 398.

Same; Motion; Requisite.—Where the misconduct of the juror is instigated, promoted or shared in by plaintiff, the motion for a new trial, based on such misconduct, is not required to aver that defendant did not discover the misconduct complained of before the rendition of the verdict.—*Ib.* 398.

New Trial; Motion; Continuance.—Where a motion for new trial was not acted on at the term at which it was filed, an order of continuance is ordinarily necessary to keep the motion alive until another regular term, but this rule does not apply to adjourned terms.—*Ashford v. McKee*, 620.

NUISANCE.

See Waters and Watercourses.

Nuisance; What Is.—An odor disagreeable to ordinary persons, not hurtful to health, is not such a physical annoyance as makes the use of the property producing it a nuisance, unless the discomfort or annoyance produced by it, is of such a degree or extent as to materially interfere with the ordinary comfort of the home existence.—*Jones v. Adler, et al.*, 435.

Same; Instructions.—A charge that the odor that was simply disagreeable to ordinary persons was such a physical annoyance as made the use of the property producing it a nuisance, whether hurtful to health or not, was calculated to cause the jury to reach the conclusion that a nuisance existed, although the disagreeable odor was of short duration, and occurred only once during the year preceding the bringing of the suit.—*Ib.* 435.

Same.—A charge asserting that if defendant participated in the maintenance of the purification plant complained of, during the year next preceding the bringing of the suit, even though such participation was through the lesses, and if foul and offensive odors and smells emanated therefrom during the year, rendering the occupancy of plaintiff's property unpleasant and uncomfortable as a home for him and his family, although this was so only at intervals, the jury should find for plaintiff, properly postulated the essentials to recovery in an action for damages caused by the maintenance of a nuisance.—*Ib.* 435.

OVERRULED CASES.

Ex parte Brown, 102 Ala. 179, by Ex parte Robinson, 30.

Ex parte Goucher, 103 Ala. 305, by Ex parte Robinson, 30.

Zaner v. The State, 90 Ala. 651, by Ex parte Robinson, 30.

B'ham Ry. L. & P. Co. v. Saxon, 179 Ala. 136, by Ala. Gt. So. Ry. Co. v. Robinson, 265.

Aetna L. Ins. Co. v. Lasseter, 153 Ala. 630, and Ferrell v. Opelika, 144 Ala. 135 and Thompson v. N. C. & St. L. Ry. 160 Ala. 590 and Wheeler v. Fuller, 4 Ala. App. 532, by Cahaba Coal Co. v. Elliott, 298.

PARTITION.

Partition; Right to.—Partition among joint tenants of land is a matter of right, including a sale for distribution; it is incident to all tenancies in common, however created, unless restricted or prohibited by contract or by law.—*Moss, et al. v. Nyc.* 544.

Same.—Homesteads vesting in the widow and minor children of the deceased, under the statute of distribution, was subject to the exercise of the rights of partition by any of the tenants in common; this has reference to conditions prior to the adoption of the Code of 1907.—*Ib.* 544.

Same.—The provisions of section 4196, Code 1907, are not retroactive, and hence, does not prevent the partition of a homestead among tenants in common such as described in said section, the title to which vested in them before the statute was enacted.—*Ib.* 544.

PAYMENT.

1. Pleas, Etc.

Payment; Plea of; Unliquidated Damages.—Payment is a mode of extinguishing a debt, and hence, a plea of payment is not a good defense to an action upon an unliquidated demand for personal injury.—*W. Ry. of Ala. v. Foshee*, 182.

Same; By Check; Presumption.—Ordinarily it is not presumed that a check is taken in payment of a claim, but an agreement that it be accepted as payment will be effectuated.—*Ib.* 182.

2. Application of.

Payment; Application; Priority.—Where a purchaser of land owed the vendor two unsecured debts which matured prior to the note for the balance of the purchase price of the land, payments made by him to decedent will be applied by the law first to the older debts, in the absence of any competent evidence to show that such payments were applied by the parties to any specific debt.—*Watson v. Appleton*, 514.

PHYSICIANS AND SURGEONS.

Physicians and Surgeons; Regulation; Constitutionality.—As applied to a mental healer for compensation, section 7564, Code 1907, is not an unconstitutional exercise of the police power.—*Ex parte Smith*, 116.

PLEADINGS.

For complaints and pleas in various actions and crimes, see that title.

1. Repugnancy.

Pleading; Complaint; Repugnancy.—A complaint for personal injuries which charges that defendant willfully, wantonly and negligently performed the acts which caused the injury is self repugnant in failing to distinguish between willful and wanton acts and acts which are merely negligent.—*Central of Ga. Ry. Co. v. Chambers*, 155.

1½. Duplicity.

Pleading; Duplicity.—A plaintiff cannot complain that a plea to the merits is double.—*Sloss-S. S. & I. Co. v. Webster*, 322

2 Construction.

Same; Objection; Construction.—Counts for injuries received by a boy because of the starting of a train, which had been blocking a public crossing, while the boy was attempting to climb over a car,

PLEADING—Continued.

which alleged in the alternative that defendant knew, or by due care should or could have known, that persons were going between the cars should be treated as counts in simple negligence and not for wanton or willful injury, in the absence of an objection to said count for repugnancy.—*C. of Ga. Ry. Co. v. Chambers*, 155.

Same.—*Construction of Complaint.*—The allegations of a complaint must be construed most strongly against the pleader when attacked by demurrer.—*So. Ry. Co. v. Hanby*, 255.

2½. Puls Darrien Continuance.

Pleading; Puls Darrein Continuance.—Where the action was for injuries, a plea that defendant had compromised and settled all claims and had taken plaintiff's written release as set out in the plea, was not strictly a plea puls darrein continuance, but under the practice in this state operated in the same manner as pleas of defense occurring since the last adjournment, and it was not necessary that such plea aver payment of cost already accrued.—*W. Ry. of Ala. v. Foshee*, 182.

3. Anticipating Defenses.

Pleading; Anticipating Defenses.—It is not necessary for a complaint to anticipate defenses; therefore, in an action against a carrier because of an illegal search of a passenger upon its premises, the complaint need not aver that the search was made by an officer of the law.—*N. C. & St. Ly. Ry. v. Crosby*, 237.

4. Demurrers.

Pleading; Demurrers; Amendment; Waiver.—Where the complaint was amended, after demurrer overruled, by striking the name of one of defendants, but not so as to change the part objected to by the demurrer, the failure to refile demurrer to the complaint as amended was not a waiver of the former ruling on demurrer.—*So. Ry. Co. v. Hanby*, 255.

Pleading; Amendment; Demurrer; Refiling.—Where a complaint is amended by adding distinct counts, after a demurrer to the original counts is overruled, the demurrant is not required to again interpose the demurrer to the amended counts in order to save for review the rulings on demurrer to the original count.—*Interstate L. Co. v. Duke*, 484.

Pleading; Demurrer; Admission.—The allegation in an answer that a county road contractor's bond was only approved by the State Highway Commission for the state funds apportioned to that county for the year 1912 must be treated as true on demurrer to such answer.—*Spraggins v. State, ex rel. Jefferson Co.*, 663.

5. Conclusions.

Pleading; Conclusions.—While conclusions may be pleaded, ordinarily they must be accompanied by averments of facts whereon issues can be understood and tried.—*Woodward Iron Co. v. Marbut*, 310.

6. Certainty.

Same; Certainty.—Certainty to a common intent in pleading is essential to the due administration of justice, the adverse party being entitled to notice of the cause he must be prepared to meet.—*Woodward Iron Co. v. Marbut*, 310.

PLEADINGS—*Continued.*

7. Obvious Defects.

Pleading; Obvious Defect; Self Correcting.—Where the complaint used the word "defendant" where it was plainly intended to use the word "plaintiff" the defect is self correcting.—*Sheffield Co. v. Harris*, 357.

8. Amendments.

Pleading; Amendment; Conditions; Waiver.—Where the court ordered the amendment to be made in purple ink, but accepted the amendment written in black ink, and refused to strike it out on defendant's motion, it waived the requirement that it should be made in purple ink, as it had authority to do.—*Clover C. Co. v. Dichl*, 429.

PUBLIC LANDS.

1. School Lands.

Public Lands; School Lands; Grant to State.—The provisions of the act admitting Alabama to the Union granting certain lands for school purposes known as the 16th section lands, was not a donation to the state, but the fulfillment of an agreement between the state of Georgia and the Federal government by which the lands were ceded to the Federal government, and which agreement provided that the provision of the ordinance governing the Northwest Territory should apply to such lands.—*State v. Board School Com.*, 551.

Same; Effect of Grant to State.—As the inhabitants of the township were not incorporated, the title to the 16th section land could not vest in them, but vested in the state for their use and benefit, which trust the state accepted.—*Ib.* 551.

Same.—After the acceptance of the trust by the state Congress had no further right to interfere in the control of the 16th section land, and its act authorizing the sale thereof conferred no additional power upon the legislature with respect thereto.—*Ib.* 551.

Same; Lease by State.—Since the statute of limitations applies to actions to recover the 16th section lands, and since they can be sold with the consent of the inhabitants, there can be no question that they can be leased in accordance with the provision of the statute.—*Ib.* 551.

Same.—The local and general laws of Alabama with regard to the 16th section land have committed to the agents or officers appointed or elected as provided by law, entire management and control of those lands, and such boards or officers may lease them for the purpose of turpentine the trees and removing the timber therefrom.—*Ib.* 551.

Same; Pleading; Construction Against Pleader.—Where the bill to cancel leases does not affirmatively show that the consent of the inhabitants to a lease of 16th section lands was not given, such consent will be presumed, if it be conceded that the acts of Congress and the state statutes require such consent.—*Ib.* 551.

QUIETING TITLE.

Quieting Title; Cloud; Void Instrument.—An instrument void on its face cannot create a cloud upon title.—*Bell v. McLaughlin*, 548.

RAILROADS.

1. Persons on Track; Injuries.

(a) Complaint.

Railroads; Persons on Track; Injury; Complaint.—A complaint against a railroad company for injuries received by a person in crossing a spur track of defendant railroad company, alleging that defendant's servant in charge of the cars, while acting within the line and scope of his employment willfully or wantonly ran down plaintiff, proximately causing his injuries, sufficiently charges a willful or wanton injury.—*L. & N. R. R. Co. v. Williams*, 138.

Railroads; Persons on Track; Injury; Complaint; Wantonness.—A complaint which alleges generally that the servants of a railroad company wantonly or intentionally ran an engine over plaintiff's intestate, sufficiently charges a wanton killing.—*So. Ry. Co. v. Hyde*, 346.

Same.—An averment in a complaint that the servants of defendant wantonly propelled the engine which ran down and killed plaintiff's intestate while crossing the track, at a high rate of speed, without any signal of its approach along the street where people in great numbers crossed and recrossed the track, and that as a proximate result of these acts, intestate was killed, sufficiently charges a wanton killing.—*Ib.* 346.

Railroads; Persons on Track; Injury; Pleading.—Where the action was grounded upon wanton injury and negligence after discovery of peril, pleas which did not show by specific averment that plaintiff was conscious of his imminent danger, were subject to demurrer.—*L. & N. R. R. Co. v. Turney*, 398.

(b) Evidence.

Same; Evidence.—Where plaintiff was the servant of a lumber company, which had a spur track running through its yards, and was struck and injured by cars shunted down the track, evidence that cars were not customarily kicked into the spur track, without warning, and that the railroad did not object to the employees of the lumber company crossing the track, was admissible, as the servants of the lumber company were not trespassers, but had a right to cross the tracks upon the premises of their master.—*L. & N. R. R. Co. v. Williams*, 138.

Same.—Evidence that the servants of the lumber company crossed the tracks at other places than that at which the accident occurred, is admissible in an action against a railroad company for injuries to a servant of the lumber company who was run down by cars shunted upon the private track of the lumber company; the restrictions relating to public crossing not being material.—*Ib.* 138.

Same; Jury Question.—Under the evidence in this case the question whether the failure to have the train under control and to keep a lookout for persons on the track, in view of the locality and the known use of the track, was negligence, and if so whether it was wanton, were questions for the jury.—*L. & N. R. R. Co. v. Turney*, 398.

Same; Burden of Proof.—Under the evidence in this case it was proper to instruct the jury that the burden of proof as to freedom from negligence was upon the railroad company under the provisions of section 5473, 5476, Code 1907.—*Ib.* 398.

(c) Duty of Lookout.

Same; Duty of Railroad.—Where a lumber company had a private spur track through its yards, and many of its employees continu-

RAILROADS—Continued.

ally crossed the tracks in the performance of their master's business, the railroad company operating over such track is bound to exercise a high degree of care and to anticipate their presence on the tracks.—*L. & N. R. R. Co. v. Williams*, 138.

Same; Duty to Maintain Lookout.—To render a railroad company liable to a plaintiff who was struck by cars shunted by one of its engines upon a private spur track, it is not necessary that the public should have ordinarily used the track, or that the servants of the railroad company should have discovered plaintiff's peril, it being liable for the willful and wanton failure of its servants to take proper precaution.—*Ib.* 138.

(d) Negligence.

Same; Negligence.—While flying switches do not constitute negligence per se, yet if the servants of a railroad company shunted cars without warning upon a spur track of a lumber company over which the servants of the lumber company were constantly passing, and such tracks were so obstructed by lumber that those crossing them could not see approaching cars, the railroad company was guilty of negligence as a matter of law.—*L. & N. R. R. Co. v. Williams*, 138.

Same; Willful or Wanton Injury.—Where the servants of a railroad company had knowledge of the very frequent presence of the employees of the lumber company on the spur track, and the likelihood that their acts would result in injury, the company is guilty of a willful and wanton wrong, where its servants shunted cars down a private spur track over which servants of a lumber company were constantly passing.—*Ib.* 138.

Same; Jury Question.—Under the evidence in this case, it was a question for the jury whether the acts of defendant's servant was the proximate cause of plaintiff's injury, and also whether defendant's servants were guilty of a willful or wanton wrong.—*Ib.* 138.

(e) Knowledge of Danger.

Same; Knowledge of Danger.—Where the servants of defendant had operated a switch engine for more than a month at the point where intestate was killed, they were charged with knowledge of the conditions there, and that a great number of people constantly passed and repassed along or across the track.—*So. Ry. Co. v. Hyde*, 346.

(f) Instructions.

Same; Instruction.—Under the facts in this case the refusal of a charge asserting that the cars must have been shoved on the track at a high rate of speed was not reversible error, because the charge is misleading; speed being a relative term, and a speed which would be high under some conditions would be deemed low under others.—*L. & N. R. R. Co. v. Williams*, 138.

Same.—A railroad company is liable for injuries received owing to the willful and wanton acts of its servants in charge of its train, although its other servants be not guilty of negligence.—*Ib.* 138.

Same; Instructions.—A charge asserting that if the servants of defendant railroad company in charge of a switch engine backed the same at a high rate of speed along the street without light or signals, and it was known to such servants that people crossed the tracks in large numbers, then their conduct was wanton, and defendant is liable, regardless of whether intestate stops to look and listen, was an invasion of the province of the jury.—*So. Ry. Co. v. Hyde*, 346.

Same.—A charge asserting that if the agent in charge of the engine was guilty of wanton negligence, then the failure of intestate to stop, look and listen would not defeat a recovery, and that the

RAILROADS—Continued.

running of the train at a high rate of speed in a populous district without signals, where the public are expected to pass and repass with frequency, creates an imputation of reckless negligence was not erroneously given.—*Ib.* 346.

Same; Instructions.—Where plaintiff admitted his contributory negligence, but set up the subsequent negligence of the company in injuring him while walking on a railroad track in an incorporated town, along the path customarily used by the public, a charge predicated a verdict for defendant solely upon the fact that, upon discovering plaintiff on the track, and his unconsciousness of the approaching train, the engineer blew his whistle and attempted to stop the train, ignored the duty of the company to have its train under reasonable control, and to keep a lookout for persons on track, and was consequently erroneous.—*L. & N. R. R. Co. v. Turney*, 398.

(g) Damages.

Same; Damages.—Where one is run down and injured by the willful or wanton acts of the servants of defendant, in assessing the damages, the jury may not only award compensation for the injuries, but may award a further reasonable sum as punishment.—*L. & N. R. R. Co. v. Williams*, 138.

Damages; Punitive.—The facts considered and it is held that the award of \$27,000 as compensatory and punitive damages was not so excessive as to denote passion, prejudice or mistake on the part of the jury.—*Ib.* 138.

2. Crossing Accidents and Incidents.

Railroads; Crossing Accident; Signals; Persons Entitled.—The provisions of section 5473, Code 1907, are intended for the benefit of persons crossing the track in front of trains and passengers attempting to board the train, and not for the protection of one who attempts to climb over or between the cars while the train is blocking a public crossing.—*C. of Ga. Ry. Co. v. Chambers*, 155.

Same; Injury to Licensee or Trespasser; Duty.—The only duty a railroad company owes to one attempting to climb over or between the cars of a train across a public highway is to exercise due care not to injure them after discovery that they are in a place of danger.—*Ib.* 155.

Same; Crossings; Mutual Rights.—Where a line of railway crosses a public highway, neither the railroad nor the public have an exclusive right of occupation.—*Ib.* 155.

Same.—The right of a railroad to obstruct a public crossing for a reasonable time gives it a right to the crossing at the time to the exclusion of any right of a pedestrian; but where such obstruction continues for an unreasonable length, the right of passage on the part of the public is restored and the railroad company must see to it that it does not injure pedestrians who are seeking to climb over or under its train, by starting the train without warning.—*Ib.* 155.

REASONABLE DOUBT.

See Charge of Court, § 3.

REFORMATION OF INSTRUMENTS.

Reformation of Instrument; Evidence; Mistake.—The evidence examined and held sufficient to sustain the finding of the Chancellor that an exception in the deed of three-fourths of an acre was intended to be an exception of only a one-half interest in that three-fourths of an acre, which the grantor had conveyed to another theretofore.—*Williams v. Williams*, 585.

RELEASE.

Release; Consideration.—A release from liability for damages for personal injury must be supported by a valuable consideration.—*W. of Ala. Ry. Co. v. Foshee*, 182.

RES JUDICATA.

See Judgment, § 1.

SHERIFFS AND CONSTABLES.

Sheriff and Constable; Action on Bond; Directing Verdict.—Where the complaint was against a sheriff and his bondsmen jointly, and contained three counts, two of which under the evidence made no case against the bondsmen, who, if liable at all, were liable only for the breach of the official bond, the affirmative charge for plaintiff could not be given, even if the fact showed an unlawful restraint of plaintiff's person, as such charges should have been restricted to the third count for breach of the bond, or to a recovery against the sheriff alone.—*Murphy v. McAdory*, 209.

SPECIFIC PERFORMANCE.

Specific Performance; Transfer by Husband; Validity; Right to Question.—Where a vendee holding under bond for title took possession of the land and impressed it with a homestead character, and then transferred his interest therein by an assignment of the bond in which his wife did not join, the failure of the wife to join could not be urged as a defense to a suit for specific performance filed by such transferee against the vendor of the transferor.—*Reid v. Allen*, 582.

STATUTES.

See Constitutional Law.

1. Construction.

Statutes; Construction; Contemporaneous Construction.—Where the proper construction is in doubt the contemporaneous construction placed thereon by the court, and by officers whose duty it was to construe it, should be regarded in determining the proper construction.—*State v. Board of School Com.*, 551.

STREET RAILWAYS.

1. Persons on Track; Collision.

(a) Complaint.

Street Railways; Persons on Track; Complaint.—A complaint alleging that the agent of defendant street railway company wantonly and willfully ran a car upon plaintiff, charges a direct trespass, and sufficiently alleges a willful and wanton injury.—*B. R. L. & P. Co. v. Johnson*, 352.

Pleading; Duplicity.—A complaint alleging in a single count that the servants of defendant railroad company willfully and wantonly ran a car against plaintiff, knocking him down and injuring him, does not set up two alternative causes of action, as only the injury is complained of, and that is charged as being both willful and wanton.—*Ib.* 352.

Same; Complaint.—The complaint examined and held to state a good cause of action as against the grounds of demurrer interposed thereto.—*B. R. L. & P. Co. v. Ely*, 382.

STREET RAILWAYS—Continued.**(b) Negligence and Care Required.**

Street Railways; Colliston; Negligence; Evidence.—The evidence examined and held to support a finding that the motorman operating the car which struck the child was guilty of simple negligence.—*Sheffield Co. v. Harris*, 357.

Same; Wantonness.—The evidence examined and held to support a finding that the motorman operating the car which struck the child was guilty of such reckless indifference to probable consequences as to amount to wantonness.—*Ib.* 357.

Same; Evidence.—Where the complaint charged wantonness in the operation of the car, evidence that the street at the point where the accident occurred was in a populous section, and was much travelled, was admissible, as bearing on the question of wanton injury resulting from the operation of the car at a dangerous speed.—*Ib.* 357.

Same; Care Required.—The motorman operating a car on its track so laid as to form a part of the street, must maintain constant watchfulness for those who are in dangerous proximity to the track in using or crossing the street, and must keep his car under such control that it may be stopped before causing injury to a person who is on or dangerously near the track.—*Ib.* 357.

Same.—A motorman operating a car on a track laid in the street cannot assume that a child of tender years on or in dangerous proximity to the track will leave it, and when he sees such a child in such a condition or position, it becomes his duty at once to put his car under such control as to enable him to immediately stop it if necessary to avert injury.—*Ib.* 357.

Same.—Since the rate of speed with which a car may be with safety operated at a given point on a street, may at another time amount to such reckless indifference to the rights of others as to amount to wantonness, under the evidence in this case it was a question for the jury to say whether plaintiff was entitled to a verdict under the 4th count.—*Ib.* 357.

(c) Instructions.

Same; Instructions.—Where complaint alleged wanton negligence a charge asserting that plaintiff did not contend that the motorman intentionally injured him. In effect informed the jury that the plaintiff abandoned the claim that the injuries had been intentionally inflicted and only claimed that they were due to such recklessness as amounted to wantonness, and hence, such instruction was favorable to appellant.—*Sheffield Co. v. Harris*, 357.

Same.—Where the evidence tended to show that the motorman saw the child approaching the track, and did not apply the air because the child had a chance to cross the track, or he thought that the child might stop before getting on to the track, and that when he attempted to stop the car he was unable to do so in time to prevent the accident, a charge asserting that if the child was on the track or in dangerous proximity thereto, and his acts indicated a purpose to cross the track, and the motorman saw him, and purposely failed to use the means at hand to prevent the injury, which means, if used, would have prevented the injury, there was wanton negligence, was not erroneous for leaving out the essential element of consciousness on the part of the motorman that his failure to use the means would probably cause injury.—*Ib.* 357.

Street Railways; Colliston; Instruction.—Where the action was for injury alleged to have been sustained in a collision between a

STREET RAILWAYS—Continued.

street car and an automobile in which plaintiff was riding, a charge asserting that if the chauffeur in charge of the automobile of plaintiff was negligent in running the automobile down a hill at the time of the collision, and if this negligence on his part was the sole and proximate cause of the collision and of plaintiff's injury, the verdict should be for defendant, was proper, and its refusal error.—*B. R. L. & P. Co. v. Ely*, 382

TELEGRAPHS AND TELEPHONES*Telegraphs and Telephones; Delay in Delivery; Damages.*

Where a telegraph company delays the transmission of a telegraph message, and thus prolongs the already existing mental anguish of the addressee, damages for the prolongation of such anguish may be recovered, since there is no distinction in principle in the act prolonging mental anguish and the negligent act causing mental anguish.—*Middleton v. W. U. Tel Co.*, 213.

Same.—No recovery for mental anguish can be had, caused by a delay in delivery of telegram, unless such damage was within the contemplation of the parties, and from the language of the message or otherwise, the telegraph company had notice that its negligence or default would likely cause damages.—*Ib.* 213.

Same.—Where a telegram was addressed to a married woman and stated that no damage had been done to a school and the children therein, it charged the company with notice that any delay in its transmission might prolong the mental anguish of the sendee of the message; it also appearing that the school referred to was situated in a town which has been swept by a tornado.—*Ib.* 213.

Telegraphs and Telephones; Message; Delivery; Damages.

Where it appeared that the sendee arrived before the funeral of her father, and that she could not have arrived before his death had there been no delay in the delivery of the message, and no wantonness was shown, a verdict for \$700 for delay in delivering a telegram announcing that the sendee's father was near death, was excessive.—*W. U. Tel. Co. v. Dunlap*, 454.

Telegraphs and Telephones; Messages; Collection of Charges;

Agency.—A messenger of a telegraph company delivering messages received at the terminal office is the agent of the company and not of the sendee, and a payment of the charges to such messenger is a payment to the company.—*W. U. Tel. Co. v. Boteler*.

Same; Delay; Payment of Charges; Effect.—The right of the sendee to recover damages for negligent delay in delivery of telegraph message is not affected by the fact that the charges thereon were paid by her husband, who was present when the message was delivered, although the husband did not intend to make the wife refund the money.—*Ib.* 457.

Same; Jury Question.—Under the evidence in this case it is a question for the jury whether the telegraph company was guilty of unreasonable delay in the delivery of the message after notice that special delivery charges would be paid.—*Ib.* 457.

Same.—Where a service message demanding special delivery charges is sent, and an answer guaranteeing the charges is received by the company, the question of whether the telegraph company performed its duty in delivering the message is for the jury.—*Ib.* 457.

THREATS.

See Homicide, § 1.

TRESPASS.

1. To Realty by Casting Debris, Etc.

Trespass; Pleading; Wanton.—When used in an action for trespass the word "wanton" is not governed by the same rules as when used in an action for negligence, but means simply an invasion of the premises of plaintiff with knowledge of the violation of plaintiff's rights, and of injuries thereby caused.—*Ex parte B'ham Realty Co.*, 444.

Same; Damages.—Exemplary damages may be awarded by the jury where a trespass is committed under circumstances of aggravation.—*Ib.* 444.

Same; Knowledge of Master; Liability.—Where fragments of rock are thrown upon adjoining premises as the result of blasting being carried on by the servants of a defendant, which were continued after notice to defendant of the injury thereby caused, it was at least a question for the jury whether defendant instigated the trespass, if it was not shown as a matter of law.—*Ib.* 444.

2. Quare Clausem.

Trespass; Land; Damages.—The fact that a tree was cut down, a fence torn down, and the soil on the land taken up, and that these wrongs were committed in the yard of the dwelling house, over protest, if sustained by the evidence is available on the issue of punitive damages, and hence, the court did not err in refusing to strike such allegations from the complaint.—*So. Ry. Co. v. Hayes, et al.*, 465.

Same; Defenses.—It is no defense to an action for trespass to real estate that one of the plaintiffs was a married woman and lived with her husband and children on the land at the time of the trespass.—*Ib.* 465.

Same; Evidence.—Evidence of a conversation between plaintiff and the agent of defendant who is alleged to have authorized the trespass, had at the time of the trespass, wherein plaintiff protested against the trespass, and the agent insisted that defendant could do the act complained of was admissible in an action by plaintiff against the principal of the agent for trespass to real estate.—*Ib.* 465.

Same.—On the question of punitive damages in an action for trespass to realty, testimony disclosing the character and intent of the wrong doer is admissible, although inadmissible to show actual damages.—*Ib.* 465.

Same; Jury Question; Title.—Under the evidence in this case the issue of the title of plaintiff, claiming title by adverse possession against defendant having the legal paper title, was for the jury.—*Ib.* 465.

Same; Wrongful Entry by Owner.—Where the action was trespass to realty, and defendant shows his ownership of the land and right to entry, he shows a complete defense though the entry was by force, and over the protest of plaintiff, the injury suffered by plaintiff by use of force by defendant being recoverable in an appropriate action therefor.—*Ib.* 465.

Same; Right of Recovery.—By showing possession only, a plaintiff may recover in an action of quare clausem fregit as against a mere trespasser, but he cannot recover as against the true owner having immediate right of possession.—*Ib.* 465.

Same.—The action of quare clausem fregit is an action for damages for injury to land, or the possession thereof, and where plaintiff does not own the land and has no right to possession against defendant, there can be no recovery; whatever damages plaintiff may have suffered in his person or as to other property.—*Ib.* 465.

TRESPASS—Continued.**3. To Personality.***Trespass; Defense; Ratification by Principle; Acts of Agent.*—

As a defense to an action of trespass for property wrongfully taken and damaged, a plea alleging that plaintiff's agent voluntarily surrendered the property to defendant was defective for failing to allege the authority of plaintiff's agent to so dispose of the property, or that plaintiff afterwards ratified the acts of his agent with full knowledge thereof.—*Interstate L. Co. v. Duke*, 484.

Same; Evidence.—Although not admissible as an absolute defense to an action for damages for wrongfully taking possession of property and damaging it, evidence that plaintiff had a contract with defendant requiring the use of the property taken, and while performing the contract plaintiff became a fugitive from justice, and left his property with another who delivered it to defendant, who retained possession thereof, and surrendered it to plaintiff on his return, was admissible on the question of damages.—*Id.* 484.

Same.—Where the action was for damages for taking and injuring personal property, and the defense alleged in the plea was that defendant held a mortgage covering the property, and that plaintiff became a fugitive from justice, abandoned the property, and that defendant took the control thereof, under the mortgage for plaintiff's benefit and protection, it was competent for defendant to show on the examination of plaintiff that plaintiff became a fugitive from justice as alleged.—*Id.* 484.

Same; Exemplary Damages.—Evidence that defendant appropriated the property in good faith for the purpose of carrying out plaintiff's logging contract with defendant, and took good care of the property, was admissible on the question of damages although not in justification of the trespass.—*Id.* 484.

Same.—Where the action was for damages to oxen and other property alleged to have been taken and damaged by defendant, and defendant claimed that it took the property to carry out a logging contract which plaintiff had made with defendant after plaintiff had abandoned the contract, evidence as to the nature and terms of the logging contract was admissible as was also repairs made by defendant to plaintiff's property alleged to have been taken.—*Id.* 484.

Same.—Although a verbal agreement extending a chattel mortgage after it had been satisfied, covering chattels claimed to have been taken and damaged by defendant, was not effectual to continue the mortgage, evidence of such agreement was admissible on the question of exemplary damages sought for taking and injuring such chattel.—*Id.* 484.

Same; Defenses.—The existence of a contract to perform a service for another requiring the employment of property in its performance will not justify unauthorized appropriations or injury of the property by the person for whom the service is being performed.—*Id.* 484.

TRIAL.**1. Objection to Evidence (Time and Nature).**

Trial; Objection to Evidence; Time.—Where the question gave notice of the anticipated answer, and defendant permitted the question to be asked and answered without objection, his motion to exclude the evidence came too late, and was properly overruled.—*Bailey v. The State*, 78.

TRIAL—*Continued.*

2. Reception of Evidence.

Trial; Reception of Evidence; Objection.—Where plaintiff was run down on the spur track, and a witness had answered in the affirmative, the question whether the conductor had been in upon the spur track before the day of the accident, and that he knew how many people crossed there, the refusal of the trial court, on motion to exclude the entire answer on the ground that it was irrelevant was proper as the objection should have pointed out the erroneous part, the gratuitous statement of the witness's conclusion as to the knowledge of the conductor.—*L. & N. R. R. Co. v. Williams*, 138.

Trial; Reception of Evidence; Rebuttal.—Where the plaintiff in his main case introduced considerable evidence as to certain stones which he alleged marked the true line, and defendant offered no evidence as to when or by whom the stones were located, a question in rebuttal to a witness whether he knew when the stones were located on that line, and by whom, was not proper.—*Ashford v. McKee*, 620.

2½. Submission of Cause.

Same; Submission of Cause; Remarks of Court; Coercion of Jury.—The facts relative to the conduct of the court in the absence of plaintiff and his counsel considered and it is held that the court's communication to the jury was not improper, and did not amount to duress or coercion.—*Ashford v. McKee*, 620.

3. Argument of Counsel.

Trial; Argument of Counsel; Objection; Sufficiency.—Where only a part of the statement made by counsel for plaintiff in argument was improper as being without support in the evidence, an objection to the whole statement was properly overruled as the attention of the court should have been directed to the part not supported in the evidence, and such objection should be promptly interposed.—*N. C. & St. L. Ry. v. Crosby*, 237.

Trial; Argument of Counsel; Remedy.—A ruling must be appropriately invoked, at once upon the utterance of such remark in order to put the trial court in error with the respect to improper remarks of counsel.—*B. R. L. & P. Co. v. Gonzalez*, 273.

Same.—Where statements by counsel are objectionable only because they are of matters of fact not in evidence, the objections thereto should so state.—*Ib.* 273.

Same.—Remarks of plaintiff's counsel that millions of nickels and dimes went into the coffers of the street car company and to the stockholders, and that we give them valuable franchises, were improper in a passenger's action for injury, and upon proper request therefor, the jury should have been instructed to disregard them.—*Ib.* 273.

4. Exceptions Good or Bad in Part.

Trial; Exceptions; Good in Part.—Where a charge is in part good and in part bad, an exception to it as a whole is not availing to present the exception to the part which is bad.—*Sheffield Co. v. Harris*, 357.

USE AND OCCUPATION.

Use and Occupation; Tenant's Rights; Evidence.—Where it appeared that when the tenant rented the land the preceding lessee pointed out the boundary as then understood by the parties, that he

USE AND OCCUPATION—*Continued.*

rented the track as agreed upon, and that even after his lessor discovered the mistake, it did not acknowledge plaintiff's claim to the land not occupied by him, plaintiff was not entitled to recover in an action for use and occupation of land which defendant had conveyed to the lessor of plaintiff, but which plaintiff had not been in possession of owing to a misunderstanding of the boundary line.—*Easterwood v. Lay*, 614.

VENDOR AND PURCHASER.

1. Lien.

Vendor and Purchaser; Vendor's Lien; Payment.—The evidence examined and held not sufficient to show that the purchaser made a certain payment to the vendor in his lifetime which the purchaser claimed to have made.—*Watson v. Appleton*, 514.

VERDICT.

Verdict; Surplusage.—Under section 7620, Code 1907, if the verdict improperly fixes the place or character of confinement of defendant, that part may be treated as surplusage and the judge may sentence defendant to the place named in the statute, or may use his discretion. If discretion is permitted.—*Ex parte Robinson*, 30.

Same.—If the verdict improperly fixes the place of confinement and in accordance therewith, the judge sentences defendant to a place other than that directed by section 7620, Code 1907, the error is in the sentence and not in the judgment of conviction, as that part of the verdict fixing the place of confinement should have been rejected as surplusage.—*Ib.* 30.

WATERS AND WATERCOURSES.

1. Dams and Breaking.

Waters and Water Courses; Nuisance; Dam; Complaint.—A complaint alleging that defendant owned and controlled certain lands upstream from plaintiff's lands, and had constructed and maintained a high dam across the stream which collected a large body of water and held the same until the occasion of the injury when the dam broke and water flowed over plaintiff's land, washing away the soil on a large area of plaintiff's farm, which was very fertile and productive before it was washed away, but was now permanently injured and damaged by reason of the dam breaking and washing the same away, was subject to demurrer for a failure to allege that the injury was due to the negligence of defendant in the construction or maintenance of the dam.—*Gloss-S. S. & I. Co. v. Wilson*, 411.

Same; Riparian Proprietors; Rights; Construction of Dam.—For his own lawful purposes, a riparian land owner may dam the water on his own land, and in doing so is not an insurer of the safety of the structure, but is only required to exercise due care and skill in the construction and maintenance thereof that his lower neighbors may not be injured by its accidental breaking.—*Ib.* 411.

Same.—In estimating the hazard to his lower neighbors by the construction of the dam, the upper riparian proprietor must take into consideration geographical situations and climatic history in order to care for conditions reasonably to be expected, whether of frequent or infrequent occurrence; if, however, after he has taken such precaution his dam is washed away by unprecedented flood without proximate, concurrent negligence on his part, he is not liable for damages.—*Ib.* 411.

WATERS AND WATERCOURSES—*Continued.*

Same; Right to Erect.—A dam constructed on a stream by an upper riparian proprietor is not a nuisance per se, and only becomes such when it is negligently constructed or maintained.—*Id.* 411.

WILLS.

Wills; Constructions; Powers.—The will considered and it is held that under it the widow of testator had the power to sell the home place for the purpose of purchasing another place on which to live, but that she had no power to sell any of the other property mentioned in the will unless advised so to do by the sons, daughters and sons-in-law mentioned in said will.—*Tilley v. Barnes*, 516.

Same.—Should the widow sell the home place, and invest the proceeds in another place in which to live, she would be entitled to the use for her life of any surplus received from the sale of the home place remaining after reinvestment in such other place.—*Id.* 510.

Wills; Description; Identification; Evidence.—Where the will through which both parties claim title, described the land by government subdivision but omitted to give the section number, it was competent to show by parol testimony that the testator owned lands in a certain section corresponding to that described in the will, and owned no other land to which the description in the will could be applied; such a case falls within the intermediate class between strictly patent and latent ambiguities in description, and in such class of cases parol evidence is admissible.—*Higgins v. T. C. I. & R. R. Co.*, 639.

WITNESSES.

1. Impeaching and Contradicting.

Witnesses; Impeachment; Inconsistent Statement.—Where a witness testified to facts damaging to defendant, it was competent, after predicate laid, to show previous statements by her that she did not see how they got defendant into it, not for the purpose of showing that her husband, upon whom defendant tried to cast suspicion was the guilty party, but for the purpose of attacking her credibility as a witness.—*Tennison v. The State*, 1.

Witnesses; Impeachment; Evidence Wrongfully Obtained.—After the indictment was returned and the witnesses summoned for the trial, certain witnesses were summoned before the grand jury and examined, and at the trial, these witnesses appeared for the defendant, and their statements before the grand jury were shown for the purpose of impeaching their testimony as witnesses for defendant. Held, if the purpose of such procedure was to procure an examination by the grand jury of defendant's witnesses before his trial, it was an abuse of power of the grand jury, but such fact would not preclude the state from utilizing evidence thus procured, for impeaching purposes.—*Smith v. The State*, 10.

Same; Credibility; Intoxication.—The evidence of a witness cannot, as a matter of law, be disregarded because the witness was somewhat intoxicated at the time of the occurrences testified to by him, although that fact may be shown and considered by the jury in determining the credibility to be given to such testimony.—*Id.* 10.

Witnesses; Impeachment.—A letter written after the commission of the crime by a detective who arrested the defendant, to another witness in the case in which he stated that it was time for such witness to get busy, asked her if she knew anything of value, and told her to keep him posted, was admissible as tending to show the interest of the witness and the detective.—*Goforth v. The State*, 66.

WITNESSES.—*Continued.*

Witnesses; Impeachment.—Whether a witness voluntarily testified for a defendant is a proper inquiry on cross-examination.—*N. C. & St. L. Ry. Co. v. Crosby*, 237.

2. Competency.

Witnesses; Competency.—Where defendant voluntarily testified as a witness, it was competent for the state to show by him that deceased was a witness against him in a pending case, which fact was known to him at the time he killed deceased.—*Robinson v. The State*, 43.

Witnesses; Competency; Payment.—Where the suit was by an administratrix to enforce a vendor's lien alleged to have been held by her intestate neither the administratrix nor the purchaser is competent under the statute to testify to transactions with or statements by such intestate regarding payments claimed to have been made by the purchaser.—*Watson v. Appleton*, 514.

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